

THE UNIVERSITY OF NAIROBI – SCHOOL OF LAW

MASTER OF LAWS (LL.M)

**LEGAL FRAMEWORK FOR ENVIRONMENTAL MANAGEMENT OF
FOREIGN DIRECT INVESTMENT IN KENYA’S MINING SECTOR**

**A Thesis submitted in Partial Fulfilment of the Requirements for the Award of the
Degree of Master of Laws (LL.M) from the University of Nairobi**

BY

EVELYNE MBULA NZUKI

G62/82375/2015

SUPERVISOR: MR. ROBERT GITAU

AUGUST, 2018

DECLARATION OF ORIGINALITY FORM

UNIVERSITY OF NAIROBI

Declaration of Originality Form

This form must be completed and signed for all works submitted to the University for examination.

Name of Students	_____
Registration Number	_____
College	_____
Faculty/School/Institute	_____
Department	_____
Course Name	_____
Title of the Work	_____

DECLARATION

1. I understand what Plagiarism is and I am aware of the University's policy in this regard
2. I declare that this _____ (Thesis, project, essay, assignment, paper, report, etc.) is my original work and has not been submitted elsewhere for examination, award of a degree or publication. Where other people's work or my own work has been used, this has properly been acknowledged and referenced in accordance with the University of Nairobi's requirements.
3. I have not sought or used the services of any professional agencies to produce this work
4. I have not allowed, and shall not allow anyone to copy my work with the intention of passing it off as his/her own work
5. I understand that any false claim in respect of this work shall result in disciplinary action, in accordance with University Plagiarism Policy

Signature _____

Date _____

SUPERVISORS DECLARATION

In my capacity as supervisor of the above candidate's thesis, I certify that this thesis has been submitted for examination with my approval as University of Nairobi supervisor.

Signed.....

Mr. Robert Gitau

Lecturer, University of Nairobi School of Law

Dated.....

DEDICATION

I dedicate this research paper to my loving and praying parents – Peter Matheka & Teresia Nthenya for the support, encouragement and investment in me, and to my brother Leon Matheka who keeps me focused and his spirited words of encouragement. I thank you all for always being there, for the support and years of encouragement.

To my friends for keeping me in check, thank you for being my tribe and the ultimate cheering squad.

ACKNOWLEDGEMENTS

Special gratitude to Mr. Robert Gitau for being generous with his expertise and time, for reading, reflecting, panel beating this work and for the patience throughout the process. The lessons are profound and indeed invaluable.

Thank you to my research assistant and friend Jepher Kere for hours spent in assembling research materials, data collection and making sense of it all. Your support and friendship has contributed greatly to this paper.

Finally, I would like to thank my lecturers for the invaluable lessons on Research and Methodology, all their support has played a vital role in the completion of this research.

TABLE OF CONTENTS

DECLARATION OF ORIGINALITY FORM.....	II
SUPERVISORS DECLARATION	III
DEDICATION.....	IV
ACKNOWLEDGEMENTS.....	V
LIST OF STATUTES.....	X
ABBREVIATIONS	XII
ABSTRACT.....	XIV
CHAPTER ONE: INTRODUCTION	
1.1 BACKGROUND OF STUDY	1
1.2 STATEMENT OF THE PROBLEM.....	5
1.3 JUSTIFICATION OF THE STUDY	6
1.4 RESEARCH OBJECTIVES	8
1.4.1 General Objective.....	8
1.4.2 Specific Objectives.....	8
1.5 RESEARCH QUESTIONS	8
1.6 RESEARCH HYPOTHESIS	9
1.7 CONCEPTUAL FRAMEWORK.....	9

1.8 LITERATURE REVIEW	12
1.9 RESEARCH METHODOLOGY.....	19
1.10 SCOPE OF THE RESEARCH	19
1.11 CHAPTER BREAKDOWN	20
CHAPTER ONE: INTRODUCTION	20
CHAPTER TWO: CONCEPTUAL ASSESSMENT OF FOREIGN DIRECT INVESTMENT AND ENVIRONMENTAL MANAGEMENT	21
CHAPTER THREE: LEGISLATIVE FRAMEWORK GOVERNING FDI AND ENVIRONMENTAL MANAGEMENT	21
CHAPTER FOUR: CRITICAL ANALYSIS OF SOUTH AFRICAN LEGAL FRAMEWORK ON FDI AND ITS IMPACT ON ENVIRONMENTAL PROTECTION IN THE MINING INDUSTRY	21
CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS	21
CHAPTER TWO: CONCEPTUAL ASSESSMENT OF FOREIGN DIRECT INVESTMENT AND ENVIRONMENTAL MANAGEMENT	
2.1 INTRIODUCTION.....	23
2.2FOREIGN DIRECT INVESTMENTS (FDIs)	23
2.1.1 Types of FDIs.....	24
2.1.2 The Determinants of FDIs.....	25
2.1.2.1 Economics factors.....	26
2.1.2.2 Political Factors	27

2.1.2.3 Business Facilitation.....	28
2.3 THE ENVIRONMENT AND ENVIRONMENTAL MANAGEMENT	29
2.4 THE IMPACT OF FDIS ON THE ENVIRONMENT	31
2.5 CONCLUSION.....	33
 CHAPTER THREE: LEGISLATIVE FRAMEWORK GOVERNING FDI AND ENVIRONMENTAL MANAGEMENT	
3.1 INTRODUCTION	35
3.2 THE CONSTITUTION OF KENYA, 2010.	35
3.3 THE INVESTMENT PROMOTION ACT, 2004.	38
3.4 THE FOREIGN INVESTMENTS PROTECTION ACT.....	40
3.5 THE MINING ACT, 2016	41
3.6 THE COUNTY GOVERNMENTS ACT	48
3.7 THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT AND THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION (AMENDMENT) ACT, 2015.....	49
3.8 CASE STUDY OF TITANIUM MINING IN KWALE KENYA.....	57
3.8.1The titanium mining process.....	58
3.8.1Effect of titanium mining on the environment.....	58
3.9 CONCLUSION.....	62

CHAPTER FOUR: CRITICAL ANALYSIS OF SOUTH AFRICAN LEGAL FRAMEWORK ON FDI AND ITS IMPACT ON ENVIRONMENTAL PROTECTION IN THE MINING INDUSTRY

4.1 INTRODUCTION63

4.2 FDI IN SOUTH AFRICA.....65

4.3 SOUTH AFRICA LEGAL AND POLICY FRAMEWORK IN THE MINING SECTOR66

 4.3.1 Environmental Laws66

 4.3.2 Mining Laws68

 4.3.3 Law in action: Palabora Copper Mines69

4.4 CONCLUSION.....71

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION72

5.2 SUMMARY OF STUDY72

5.3 FINDING74

5.4 RECOMMENDATIONS.....78

BIBLIOGRAPHY81

LIST OF STATUTES

County Government act, No. 17 of 2012, Laws of Kenya.

Environmental management and Coordination Act, No. 8 of 1999, Laws of Kenya.

Foreign Investments Protection Act, Chapter 518, Laws of Kenya.

Investment Promotion Act, Chapter 485B, Laws of Kenya.

Mining Act, No. 12 of 2016, Laws of Kenya.

South African Atmospheric Pollution Prevention Act, No. 45 of 1965, Laws of South Africa.

South African Environment Conservation Act, No. 73 of 1989, Laws of South Africa.

South African Hazardous Substances Act, No. 15 of 1973, Laws of South Africa.

South African Marine Living Resources Act, No. 18 of 1998, Laws of South Africa.

South African National Environmental Management Act: Integrated Coastal Management –
No. 24 of 2008, Laws of South Africa.

South African National Environmental Management Act, No.107 of 1998, Laws of South
Africa.

South African National Environmental Management Act: Air Quality Act, No. 39 of 2004,
Laws of South Africa.

South African National Environmental Management Act: Biodiversity Act, No. 10 of 2004,
Laws of South Africa.

South African National Environmental Management: Protected Areas Act, No. 57 of 2003,
Laws of South Africa.

South African National Environmental Management: Waste Act, No. 59 of 2008, Laws of South Africa.

South African National Heritage Resources Act, No. 25 of 1999, Laws of South Africa.

South African National Water Act, No. 36 of 1998, Laws of South Africa.

South African Nuclear Energy Act, No. 46 of 1999, Laws of South Africa.

South African Protection of Investment Act, No. 22 of 2015, Laws of South Africa.

ABBREVIATIONS

CDM- Clean Development Mechanism

EIA- Environmental Impact Assessment

ELC- Environment and Land Court

EMCA- Environmental management and Coordination Act

EPA- Environment Protection Authority

FDI- Foreign Direct Investment

GDP- Gross Domestic Product

KEBS- Kenya Bureau of Standards

KIPI- Kenya Industrial Property Institute

KIRDI- Kenya Industrial Research and Development Institute

NEMA- National Environmental Management Authority

NGOs- Non-Governmental Organizations

PIA-Protection of Investment Act

SDGs – Sustainable Development Goals

UNCTAD- United Nations Conference on Trade and Development

V.A.T- Value Added Tax

ABSTRACT

Foreign direct investment (FDI) is important for Kenya's economic growth and development especially in Kenya's mining. FDI inflows to Kenya's mining sector has particularly grown because, Kenya is endowed with numerous mineral resources but largely lacks the expertise, equipment and manpower to exploit these minerals resources. It is thus undeniable that FDIs play a vital role in the contribution towards a country's development by way of promoting technological spillovers, supply of requisite skills and managerial capabilities in Kenya's mining sector that would be difficult to generate domestically; in tandem with the Sustainable Development Goals (SDGs).

FDI legal framework in Kenya as relates to the mining sector *inter-alia* regulates entry requirements for which foreign companies must fulfil to be granted mining permits. It also provides for protection mechanisms to foreign companies once they have invested in a bid to provide a conducive environment for investment and trade in the country. However, as will be demonstrated in this study, there is a lacuna in law with respect to management and monitoring as far as regulating and monitoring these companies to ensure that they do not engage in activities that negatively affect the environment.

This study will examine the efficacy of the legal framework for environmental management of FDI in Kenya's mining sector, including the laws that provide for protection of the environment, environmental management and conservation.

In order to achieve the above, the study endeavours to examine the interface between mining and environmental management as well as the effectiveness in the implementation of the existing legal framework.

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND OF STUDY

Foreign direct investments (FDIs) are a catalyst in promoting sustainable development and economic growth in developing nations. It is noteworthy that Kenya, in tandem with the Sustainable Development Goals (SDGs), is keen on eradicating poverty, ensuring availability and sustainable management of water and sanitation for all, building infrastructure and promoting industrialization and innovation. In so doing, Kenya largely relies on FDIs to meet the global goals by the year 2030. This study conceptualizes FDI as “an investment involving a long-term relationship and reflecting a lasting interest and control by an entity in one economy in an enterprise resident in another economy.”¹

Kenya, is a developing nation in Sub-Saharan Africa, inevitably benefits from FDI and continually seeks to develop its economy by creating investment and trade opportunities. To actualize this, the government of Kenya has made concerted efforts to raise its global profile with the aim of providing a conducive investment climate by initiating various economic reforms to encourage and promote FDI. The first of these efforts was the formulation of the Economic Recovery Strategy for Wealth and Employment Creation (ERS) and the Vision 2030 document.² These two policies developed in 2003 and in 2008 respectively were adopted with the aim of setting Kenya back on the path of growth following two decades of stagnation.

¹ United Nations Conference on Trade and Development, “World Investment Report 2007: Transnational Corporations, Extractive Industries and Development,” The world Investment Report 2007 (WIR07) Switzerland: United Nations, 2007, available at http://unctad.org/en/Docs/wir2007p4_en.pdf accessed on 18th September 2016.

² The ERS was a five-year policy set to expire in 2007/2008. Thus in 2007 the government began developing a new long-term policy to replace the ERS. In this endeavor, the government launched the Kenya Vision 2030 policy in June of 2008.

ERS and Vision 2030 articulate the Kenya's strategy over the period beginning 2003 to 2030. These policy documents set forth a vision where Kenya will eventually transform into an industrialized economy that can guarantee a high quality of life for all its citizens by 2030. Both policies identify FDI as a fundamental cog in achieving the set goal.

It is for this reason that the government of Kenya moved to formulate specific legislations that provided a legal basis for FDI in Kenya. Key among these legislations are the Investment Promotion Act (IPA)³ and the Foreign Investment Protection Act (FIPA).⁴ The IPA is the legal regime that not only promotes but also regulates FDI. FIPA on the other hand makes provisions for protection of certain approved foreign investments. Consequently, foreign investors have invested in various sectors of the Kenyan economy. However, this study only restricts itself to FDIs in the mining sector.

FDI inflows in Kenya's mining sector has particularly grown because Kenya is endowed with mineral resources,⁵ but lacks the requisite expertise, equipment and manpower to exploit these mineral resources. Indeed, since independence, local mining activities were mostly small scale or artisanal mining carried out under informal arrangement with little or no government oversight and mainly by poor community members.⁶ Over time Kenya has embraced large scale mining following commitments by various multinational companies to invest in the mining sector.

The importance of FDI in the mining sector cannot be understated especially in the provision of technological spillovers, skills and managerial capabilities in Kenya's mining sector that

³ Chapter 485B, Laws of Kenya.

⁴ Chapter 518, Laws of Kenya.

⁵ Reported minerals in Kenya include but not limited to soda ash, limestone, coal, titanium, fluorspar, gold, gypsum, manganese, chromite, iron ore, diatomite and silica sand.

⁶ UK Aid: Recommendations for the development of Kenya's extractive industries based on inclusive Multi-stakeholder consultation. Nairobi, Adam Smith International (2013).

would be difficult to generate locally.⁷ Indeed, statistics show that ninety nine percent of the licensed operational companies in the Kenyan extractive industry are either foreign companies or Kenyan subsidiaries/branches of the said foreign-owned companies that are wholly owned by foreign conglomerates.⁸ This study will discuss Tiomin Kenya Limited, a wholly owned subsidiary of the Canadian firm Tiomin Resources Inc. which was issued with a mining licence in July, 2000 for purposes of mining titanium in Kwale County.⁹

It is important to note that prior to 2000, Tiomin Resources Inc. had been granted a number of explorations licenses in Kenya. After the exploration phase, the company settled to undertake the project in Kwale for the mining of titanium. In this regard, it engaged the government in order to be apprised of the licencing requirements to determine if its proposed project would be plausible. Pursuant to these discussions, Tiomin Resources Inc. had to meet certain substantive requirements in order for the statutory Mining Licence to issue from the Government of Kenya. These requirements included a stipulation that Tiomin Resources Inc.'s operations in Kenya had to be undertaken by a Kenyan based company. This was what informed the incorporation of Tiomin Kenya Limited.¹⁰

The other requirements were that the company had to commission and complete a full engineering feasibility and an environmental impact assessment study. It was stipulated that both these studies had to be approved by the relevant governmental agencies after a comprehensive review.¹¹ Eventually, Tiomin Kenya Limited presented to the Kenyan

⁷ Olson, M., "The rise and decline of nations: Economic growth, stagflation, and social rigidities. Yale University Press (2008).

⁸ See for a list of companies involved in Kenya's mining industry; <http://www.mining.go.ke> accessed on 18th September 2016. See also Kenya Mining Handbook 2015, at 18-19.

⁹ Leah Temper, Daniela Bene, and Joan Martinez-Alier, 'Mapping the Frontiers and Front Lines of Global Environmental Justice: The EJAtlas', *Journal of Political Ecology* 22 (2015): 255-78.

¹⁰ "International Investment and Environmental Issues: The case of Kenya's Kwale Mineral Sands Project," Consumer Unity & Trust Society (CUTS) Investment Development Project Study on Investment regimes in selected Developing Countries (2001), at 2.

¹¹ Ibid, at 3.

government an Environmental Impact Assessment (EIA) Report in April 2000. The said report was reviewed and later approved in November 2000.¹²

The residents of Kwale County registered their oppositions to the project. This culminated in some of the residents instituting a representative suit against the company in *Rodgers Muema Nzioka & 2 others v Tiomin Kenya Ltd.*¹³ Among other complaints, the Plaintiffs contended that the EIA report was not only factually incorrect but also did not outline the appropriate environmental management and conservation mechanisms to be undertaken by the company in the course of their activities. Essentially the residents protested the fact that the EIA report was approved in spite of Tiomin Kenya Limited not presenting a comprehensive resettlement plan, and having not shown what plan it had put into place to avoid the effects of exposed titanium, to redress radioactivity, Sulphur dioxide pollution, or dust pollution. In his ruling Hayanga J. (as he then was), noted that there had been failure by government agencies to take into consideration the environmental impact of the mining activities by the company. The case and the ruling notwithstanding, Tiomin Kenya Limited had already obtained its mining licence, and continued with mining activities. Eventually Tiomin Kenya Limited transferred its mining rights to another foreign firm, the Australian Base Titanium Limited in 2010. At the time of departure, it became apparent that Tiomin Kenya Limited's mining activities had triggered multifarious environmental and health problems.

In a study carried out by the National Environmental Management Authority (NEMA) for the period between 2010-2012 in respect to Tiomin Kenya Limited mining activities it was observed that, even though the company had allegedly put in place dust monitors, in the entirety of the time they operated in the area, air pollution due to the mining dust was frequently observed. Further, concerning water pollution in Kwale County as a result of the mining

¹² Ibid, at 4.

¹³ [2001] eKLR.

activities by Tiomin Kenya Limited, it was observed that due to titanium mining ground water bodies had been contaminated and overall quality of water degraded. It was also noted that the mining operations had resulted in permanent changes to the topography of Kwale county. As a result of this change in topography, many springs in Kwale county experienced a change in yield, while some also disappeared completely.¹⁴

It is noteworthy that as this environmental ignominy occurred, different government agencies were vested with the authority to monitor the operations of Tiomin Kenya Limited and ensure its compliance in protecting the environment.

In taking the above into consideration, this study will look into the efficacy of the legal framework for environmental management of FDI in Kenya's mining sector. The study will outline the robust regime for the management and conservation of the environment in Kenya but also outline the shortcomings of enforcement agencies implementing these laws. Thus, this study will analyse the conduct of titanium mining in Kwale and the impacts of the same on the environment, to assess the relationship between the legal framework for FDI and the implementation of laws dealing with environmental management in the country.

1.2 STATEMENT OF THE PROBLEM

An ideal legal framework for FDI should not only take into consideration economic development, but also promote sustainable development through inclusion of provisions for protection of the environment and other communitarian concerns.¹⁵ It is beyond peradventure that national governments pay little attention to the said communitarian perspectives.

¹⁴ NEMA, Environmental Influence Assessment of the Titanium Mining Project in Kwale District, Kenya, Nairobi (2012).

¹⁵ Pascale Hatcher, 'Local Communities and Multilateral Safeguards: The Mining Regime of Lao PDR', Working Paper, New Approaches to Building Markets in Asia, 9, available at, http://lkyspp.nus.edu.sg/cag/wp-content/uploads/sites/5/2013/05/NATBMA_WP12-41.pdf accessed on 19th May 2016.

Generally, developing countries such as Kenya, encourage FDI inflows due to the development benefits associated with FDI. However, more often than not, they end up disregarding the environmental and social detriment that invariably arises.¹⁶ It is arguable that the legal framework for environmental management does not adequately address activities in the extractive industry.¹⁷

Kenya's FDI framework in the mining sector only regulates entry requirements for which foreign companies must fulfil to be granted relevant permits. Further they also provide for protection mechanisms to foreign companies once they put their investments. However, the law does not adequately address consideration for regulating and monitoring the companies to ensure that they do not engage in activities that negatively affects the environment. Even though there are environmental safeguard provisions in the Mining Act¹⁸ and the Environmental Management and Co-ordination Act (EMCA)¹⁹ there is lack of appropriate enforcement mechanisms to ensure the implementations of these provisions.

1.3 JUSTIFICATION OF THE STUDY

Kenya intends to join the ranks of middle income and industrializing countries as is outlined in Kenya Vision 2030. To achieve this, Kenya continues to partner with other economies through investment from foreign companies. This is particularly seen in Kenya's mining industry where most, if not all, companies in the extractive industry are foreign owned.

This study will interrogate the efficacy of Kenya's legal framework for environmental management of FDI in the mining industry. Ultimately the intention is to show that the law

¹⁶Otieno Vivian Achieng, 'The Right to Development and Foreign Direct Investment in Kenya' (University of Nairobi, 2013).

¹⁷KatindiSivi-Njonjo and others, *Local Communities in Kenya's Extractive Sector: From Paternalism to Partnership* (KatindiSivi-Njonjo ed, Norwegian Church Aid (NCA) 2015) 87, 88.

¹⁸ No. 12 of 2016 of the Laws of Kenya.

¹⁹ Chapter 387 of the Laws of Kenya.

provides for entry requirements for which mining companies must meet for them to qualify for mining permits. There are further provisions on how the investments by these foreign companies are protected so as to encourage further investments on their part. However, the study will show that there is a lack in enforcement, accountability and monitoring mechanisms to ensure that Kenya's environmental protection and management laws are strictly adhered to.

The world is increasingly facing the consequences of climate change. It is important for any country to explore ways of ensuring that while it strives for growth, the same should not be at the expense of the environment. This study will demonstrate that seldom does Kenya internalize the detrimental effects that mining projects may have on their environment. They mostly focus on the benefits that come as a result of such projects. Most often, environmental conservation and protection is usually an afterthought as environmental degradation is usually gradual with the full effects being felt years later.

There are very few studies on the efficacy of Kenyan law in the regulation of FDI in the Kenyan mining industry and particularly the impact of the activities of foreign mining companies on the environment. It is therefore important for studies to evaluate the nature and efficacy of Kenyan law in regulating FDI in Kenya's mining sector. Particularly, to what extent do such laws promote both FDI as well as environmental protection considerations before and after allowing foreign companies to operate in the Kenyan mining industry?

With the recent increased exploration activities in Kenya, there is need to have studies that emphasize that the government in promoting FDI should not waive and/or undervalue environmental conservation and management. Ideally environmental laws must apply equally to Kenyan as well as foreign companies.

1.4 RESEARCH OBJECTIVES

1.4.1 General Objective

Generally, this study seeks to find out whether Kenya has struck a balance between encouraging foreign investments and ensuring environmental management and conservation.

1.4.2 Specific Objectives

1. To highlight the impact of FDI on the environment in the mining industry in Kenya in light of the SDGs.
2. To analyse the relationship between the legal framework for FDI and the implementation of laws dealing with environmental management in the country.

1.5 RESEARCH QUESTIONS

The following research questions are addressed in this study:

1. To what extent is Kenya's legal, policy and institutional framework on FDI concerned with environmental management within the mining industry?
2. What is the impact of FDI on the management of environmental in the Titanium Mining Industry in Kwale County?
3. How has South Africa's legal, policy and institutional framework on FDI provided for Environmental Management within its mining industry?
4. What reforms should be introduced to Kenya's legal framework on FDI to enhance environmental protection within the mining industry?

1.6 RESEARCH HYPOTHESIS

The study assumes that Kenya's legal and policy framework for environmental management of FDI in the mining industry is lacking in appropriate enforcement and implementation mechanism to ensure that Kenyan law on environmental conservation and management are strictly adhered to.

The prevailing perception is that the government is not exercising strict supervision and is focusing mainly on marketing itself as an investment destination and the strict implementation of environmental laws would only serve to slow down investments. This lack of implementation only ends up causing environmental degradation.

1.7 CONCEPTUAL FRAMEWORK

The three main concepts in this study are FDI, environmental management and sustainable development in tandem with the SDGs. This section presents an illustration of the relationship between the three from the researcher's perspective. The conceptual framework guides this study and underlies the researcher's arguments.

It is important to point out that this study will first begin with offering appropriate definition to FDI, environmental management and sustainable development before embarking on a conceptual analysis of their relationship.

The IPA does not define FDI. There are however suitable definitions provided in various literature that encompasses the essential aspects of FDI. The United Nations Conference on Trade and Development (UNCTAD) defines FDI as "investment in foreign assets, such as foreign currency, credits, rights, benefits or property, undertaken by a foreign national for the

purposes of production of goods and services which are to be sold either domestically or exported overseas.”²⁰

According to EMCA, “environmental management’ includes the protection, conservation and sustainable use of the various elements or components of the environment.”²¹ The components of the environmental relevant to environmental management include ‘natural resources’ defined under the Constitution of Kenya 2010 to include minerals.²² Environmental management in this study refers to sustainable use and conservation of minerals in Kenya.

The World Commission on Environment and Development defines ‘sustainable development’ as development that “seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future.”²³ This study uses this definition to propose development in the mining industry that allows the future generations to benefit from the available natural resources. Moreover, the study is premised on the argument that it is possible to have development in the industry without prejudicing the rights of the future generations.

On one hand, FDI inflows to developing countries play an important role in shaping their development. On the other hand, environmental management laws and policies aid states in protecting and conserving the various elements of their environment within.

²⁰Daniel O Abala, ‘Foreign Direct Investment And Economic Growth: An Empirical Analysis Of Kenyan Data’, *DBA Africa Management Review* 4, no. 1 (April 2014): 63; United Nations Conference on Trade and Development (UNCTAD), ‘UNCTAD WID Country Profile: KENYA’ (UNCTAD, November 2006); Mohammed Mustapha Wasseja and Samwel N Mwenda, ‘Analysis of the Determinants of Foreign Direct Investment in Kenya’, *Journal of Multidisciplinary Scientific Research* 3, no. 4 (2015): 16–26.

²¹ EMCA (n 18), section 2.

²²Republic of Kenya, ‘Constitution of Kenya’ (2010), Article 260.

²³World Commission on Environment and Development, ‘Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report)’ (Oslo, Norway: World Commission on Environment and Development, 1987), chap. 1.

However, an overriding need to achieve development and conserve the environment by a country often come into conflict where a state chooses to over-emphasis the fostering of development by purposely undervaluing their environment standards in order to attract new investment thus undermining efforts to conserve the environment. The consequence of such actions directly affects the quality of life and would threaten the survival of the citizenry within such a country.

It is noteworthy that most development activities worldwide tap on their respective wealth in natural resources and the availability of the necessary skill, labour and industry to exploit these resources. However, the ever-increasing rates of exploitation of natural resources could lead to the depletion of these resources. This may also lead to the loss of high levels of biodiversity loss and a subsequent reduction in the quality of life which is improved through the protection of the environment.²⁴ Additionally, a country where its citizenry is hampered by health problems resulting from the consequences associated with degradation of the environment, is a state in shortage of healthy manpower to aid in driving said country's forecast development objectives.²⁵

Proponents of the economic theory of sustainability posit that an increase in FDI has the potential of exacerbating unsustainable development unless matched by efficient utility of natural resources.²⁶

²⁴ Copeland B. and Taylor M., "Trade, Growth and the Environment", *Journal of Economic Literature*, Vol. XLII (2004).

²⁵ Bloom, D. E., Canning, D. and J. Sevilla "The Effects of health on Economic Growth: Theory and Evidence", NBER Working Paper No 8587 (2001).

²⁶ Zarsky, L., "Havens, halos and spaghetti: untangling the evidence about foreign direct investment and the environment", OECD, Conference on Foreign Direct Investment and the Environment, The Hague, Netherlands, January 28–29 (1999), at 4-5.

In this sense, FDI should be undertaken within strict limits grounded on principles and deliberate choices to protect the environment. It is only then that sustainable development is achieved.

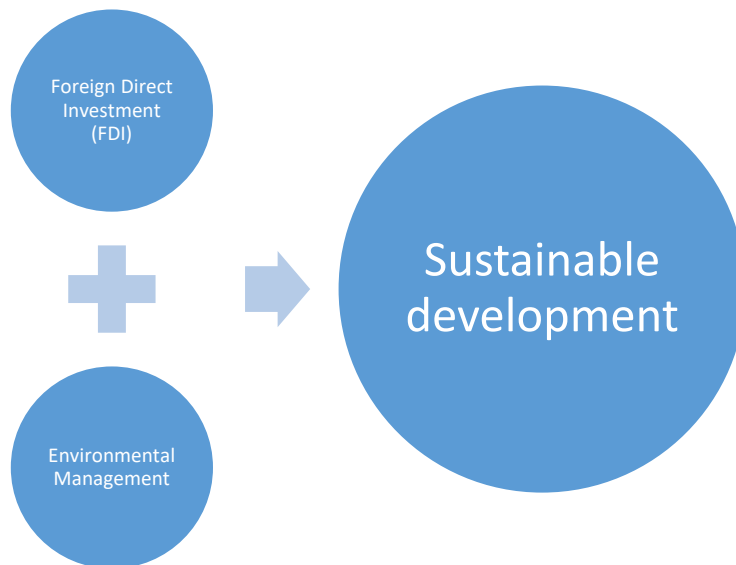


Fig 1: Conceptual Framework, Source: Author

The conceptual framework shows FDI and environmental management may be employed together to achieve sustainable development of the mining industry in Kenya.

1.8 LITERATURE REVIEW

Letnes analyses the ‘ambiguous relationship’ between FDI and human rights, and notes that FDI in developing nations has been plagued by the shift in bargaining power to the detriment of the host country.²⁷ This fortifies the argument that there may not be a solid relationship between FDI and economic and social welfare which is squarely the concern of this study. According to Letnes, FDI has a positive relationship with economic development, and therefore a ripple effect on socio-economic rights.²⁸ The link might therefore not be a direct one.²⁹ Letnes

²⁷ Bjørn Letnes, “Foreign Direct Investment and Human Rights: An Ambiguous Relationship, Forum for Development Studies, 29:1, 33-61 (2011), at 38.

²⁸Ibid.

²⁹Ibid., at 53.

only makes a passing reference to the environment in his study, and instead focuses on human rights in general.³⁰ This study develops the argument that there is a divergent relationship between FDI and human rights, while focusing on the environmental impact of FDI. The study contributes to the discourse on the effects of FDI in a developing country, with a specific case study of the mining industry in Kenya.

Kiviyiro examines the contribution of environmental management and FDI to sustainable management, highlighting the relationship between FDI, GDP and exports in the Republic of Congo, Burundi, Rwanda, Uganda, Tanzania and Kenya. He thus proposes the use of Clean Development Mechanism (CDM) projects to assist these countries achieve sustainable development.³¹ Under the Kyoto Protocol, a CDM is a project used to assist a state to achieve sustainable development through achieving emission reductions.³² While Kiviyiro's study is empirical in nature, from a perspective of economics, this study dwells on the legal implications of the relationship between environmental management and FDI. It takes a qualitative angle as opposed to a quantitative angle in order to explain the relationship between the two variables in the mining industry in Kenya.

Ziyane finds that the development of technology and institutions can assist developing countries to benefit from FDI and highlights the wide disparities in presence of FDI assets among different African countries.³³ Ziyane's study compares the institutional framework in South Africa and Kenya, stating that South Africa has more vibrant state-owned and government-backed institutions involved in FDI where the government plays a limited role in

³⁰Ibid., at 37.

³¹Pendo Teresia Kiviyiro, 'Foreign Direct Investment, Clean Development Mechanism, and Environmental Management: A Case of Sub-Saharan Africa' (Doctor of Science (Economics and Business Administration) Thesis, Lappeenranta University of Technology, 2015).

³²United Nations, 'Kyoto Protocol to the United Nations Framework Convention on Climate Change' (1998), art 12.

³³Barbara Tintswalo Ziyane, 'The Linkage between Foreign Direct Investment and Economic Growth: A Comparative Case Study of Kenya and South Africa' (MA (Economics) Thesis, University of Johannesburg 2008) 107.

the decision-making processes of these institutions, merely providing guidelines, political stability, infrastructure, and funding.³⁴ From Ziyane's perspective, Kenya's institutions lag behind in promotion of positive effects of FDI, at a time when the Kenya Investment Promotion Centre was responsible for certification of investors with investments that had no negative environmental implications.³⁵ Ziyane also identifies the Kenya Industrial Research and Development Institute (KIRDI), Kenya Industrial Property Institute (KIPI), Kenya Bureau of Standards (KEBS) and universities, as important institutions in Kenya's framework for FDI.

The Investment Promotion Centre is now known as the Kenya Investment Authority.³⁶ With the establishment of NEMA, the Kenya Investment Authority may refer applications for investment certification to NEMA where the application raises environmental issues.³⁷ This study therefore builds on the view that institutions in Kenya are critical in promoting positive environmental effects of FDI. Ziyane's study was carried out when the legal and institutional framework on environment in Kenya was not as developed as in present day. This study gains from the establishment of NEMA, and therefore adds recent information to the discourse on the institutions involved in Kenya's experience of the interplay between FDI and the environment. This study is also specifically concerned with the environmental impact of FDI, zeroing in on the mining industry in Kenya. The focal point is therefore different, and this study contributes to the literature on FDI in Kenya by addressing the environmental management enforcement issues.

Nguku argues that FDI does not have a large impact on the economy of Kenya because the country does not receive a large enough volume of FDI to cause a significant change in balance

³⁴Ibid., 108.

³⁵Ibid., 78, 108.

³⁶Republic of Kenya, 'Investment Promotion Act', 6 § (2004), sec. 14(1).

³⁷Republic of Kenya, Investment Promotion Act, First Schedule para 7(1).

of payments.³⁸ He recommends a focus on formulating proper policies for the country to attract more FDI with the intention to increase the positive advantages of FDI inflows.³⁹ Nguku's study is from a perspective of business where FDI's positive impact is in question. However, Nguku's study does not analyse the environmental impact of FDI. It also does not address the legal mechanisms related to regulating FDI inflows to minimise the negative effects on the environment. This study contributes to filling this gap by examining the legal considerations that Kenya should take into account when dealing with FDI, to ensure that sustainable development is achieved.

Riddervold finds that there is a limited contribution of FDI to economic growth through increase of employment opportunities, noting that the negative impact of FDI include exploitation of local people by the foreign firms where unskilled people including children are involved in the industries.⁴⁰ This observation magnifies the assumption made in the present study, that the negative effects of FDI on a country must not be overlooked. The increase in the number of foreign firms with massive investments in natural resources, an area where the government requires the finances, may lead to a situation where violations of human rights and instances of environmental degradation might be considered to be allowable collateral damage. Riddervold does not dwell on the environmental impact, but instead addresses the issue from a labour perspective. Nyamwange takes a similar angle, arguing for guided training and integration of the human resources in the employment of the foreign companies to contribute to economic growth.⁴¹ Therefore, the present study is important in this gap of knowledge by focusing on environmental management in the mining industry.

³⁸Eric K Nguku, 'Relationship between Foreign Direct Investment and Balance of Payments in Kenya' (Master of Business Administration, University of Nairobi, 2013), 36.

³⁹Ibid.

⁴⁰Sindre Riddervold, 'The Effects of Foreign Direct Investment on the Ugandan Economy' (Master's Thesis, University of Agder 2011) 61, 62.

⁴¹Mathew Nyamwange, 'Foreign Direct Investment in Kenya', MPRA Paper (University of Nairobi, 2 October 2009), 16.

Adewumi discovers that while FDI contributes to the growth of most African countries, its impact in certain aspects such as knowledge acquisition, technology and international image cannot be adequately measured using quantitative analyses because of the low sample size.⁴² Adewumi comments on the concentration of FDI in areas such as oil exploration instead of industries that have more room for growth such as agriculture, citing reasons such as ‘quick profits’ for the bias to the extractive sector.⁴³ However, Adewumi’s study examines the impact of FDI on economic development, leaving a gap in literature for the impact of FDI on sustainable development through focus environmental management. This is the gap that the present study seeks to address.

Menamo argues that while there is a positive correlation between FDI and economic growth, there is a two-year lag between the FDI inflow and economic impact. This is with reference to Ethiopia.⁴⁴ The legal aspects in Menamo’s study focus on guaranteeing protection against expropriation of the foreign company’s assets through instruments such as the Investment Proclamation 2002.⁴⁵ However, Menamo does not discuss the legal framework for promotion of environmental management in the mining sector. The relevance of the present study is evident because it adds to the discourse on the impact of FDI in Kenya, a developing country. Also, while Menamo’s study employs a time series empirical analysis as its methodology, the present study uses a qualitative methodology to explain the interplay between FDI and environmental management in Kenya.

⁴²Sarumi Adewumi, ‘The Impact of FDI on Growth in Developing Countries: An African Experience’ (Master Thesis, Jönköping University 2006) 15.

⁴³Ibid.

⁴⁴Meskerem Daniel Menamo, ‘Impact of Foreign Direct Investment on Economic Growth of Ethiopia: A Time Series Empirical Analysis, 1974-2011’ (Master of Philosophy in Environmental and Development Economics, University of Oslo, 2014), 44.

⁴⁵Meskerem Daniel Menamo, ‘Impact of Foreign Direct Investment on Economic Growth of Ethiopia: A Time Series Empirical Analysis, 1974-2011’.

Eshete and Gebre identify food insecurity, land grabbing and poor practice in environmental protection as the major risks of FDI.⁴⁶ Eshete and Gebre highlight the importance of the legal mechanism of environmental impact assessments as the linking point between FDI and the environment, with a bias for the Ethiopian experience with the Environmental Impact Assessment (EIA proclamation (299/2002) and the Environmental Impact Assessment Procedural Guidelines made in 2003 by the Environment Protection Authority (EPA)).⁴⁷ This argument for a comprehensive legal framework for FDI to include environmental concerns in the host country supports the present study. Eshete and Gebre limit, in their study of Ethiopia, leave a gap in literature by their geographical scope. The present study addresses this gap by zeroing in on the mining industry in Kenya and the specific risk of poor environmental management in the country related to FDI inflows.

Mabey and McNally argue that discussions on the international platforms take keen interest in the pollution havens hypothesis, a proposition that firms select which country to invest in by examining the environmental regulation and therefore the country where there is more potential for business without ‘disturbance’ from the government.⁴⁸ This position fortifies the argument in the present study that an increase in FDI inflows may not be an indication of a beneficial legal framework for investment, but may also arise from inadequate provision for environmental and social concerns in the legal framework for FDI. Mabey and McNally criticise the tendency to applaud any FDI for the sake of having ‘economic development’, illuminating on the fact that the industries with the most pollution tend to relocate to jurisdictions with the weakest environmental regulation, and promoting comprehensive

⁴⁶Biruhe Eshete and Thomas Gebre, ‘Foreign Direct Investment (FDI) Development between the European Union (EU) and Least Developed Countries (LDCs) - Business Opportunities in Ethiopia’ (Bachelor’s Thesis, Haaga-Helia University of Applied Sciences, 2012), 100.

⁴⁷Ibid., 93 – 95.

⁴⁸Nick Mabey and Richard McNally, ‘Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development’ (WWF-UK, August 1999), 92.

regulatory frameworks to achieve sustainable development.⁴⁹ This appears to be a wake-up call to those who may promote FDI at any cost. The present study attempts to go further by arguing that the interests of the company to make profits may lead to disregard for the environmental and social welfare. The present study also further illustrates situations where Kenya, the host state, may be trading the welfare of the future generations for the economic benefits.

Pigato warns that environmental management is important in the extractive industry because of the danger that wanton exploitation as a result of FDI could deplete the non-renewable natural resources.⁵⁰ Pigato, however, does not specifically address the legal provisions that should be incorporated into a legal framework for FDI to reduce the risk of exploitation. Mabey and McNally discuss the need for ‘sustainable investment flows’, denoting the positive correlation between FDI and environmental management, proposing more detailed regulation in areas including mining.⁵¹ Mabey and McNally’s study does not take a specific case study, therefore leaving room for a country-specific examination of the legal framework for FDI and environment. The present study addresses this gap by introducing the Kenyan experience to the discussion on the relationship between FDI and environmental management.

In conclusion, the literature review shows that there is limited information available about the relationship between the legal framework for FDI and environmental management in the mining industry in Kenya.

This study is therefore well poised to address this gap by assessing the laws promoting FDI on the one hand and the environment on the other hand, to propose legal mechanisms through which Kenya may achieve sustainable development.

⁴⁹Ibid.

⁵⁰Miria A Pigato, ‘The Foreign Direct Investment Environment in Africa’, Working Paper, Africa Region Working Paper Series, (April 2001), 2, <http://www.worldbank.org/afr/wps/wp15.pdf>.

⁵¹Nick Mabey and Richard McNally, ‘Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development’, 8.

1.9 RESEARCH METHODOLOGY

This study is largely desk-based research consisting of an analysis of the Constitution of Kenya 2010, legislation, regulation, case law, books, journals, and other relevant scholarly material. In a desk research, secondary data is collected from various sources including law libraries and the internet, without field research.⁵²

There are a number of reasons for this decision. First, the case study involves multiple locations where the activities are carried out. Fieldwork to the various locations where the mining activities are being conducted/ carried out to observe the condition of the environment and interview members of the local community would not be necessary because there is documentation available on the effects of the mining on the environment and society.

Secondly, field research would involve travel to the different locations which would be costly. A desk research is favoured in this study because it achieves the goal of obtaining the data required to analyse the legal framework for FDI and the environment.

Thirdly, desk research would allow faster collection of information with a global scope of the views on the legal framework for FDI in Kenya.

1.10 SCOPE OF THE RESEARCH

A study on FDIs as a whole would be very extensive and would invariably involve so many aspects as well as other disciplines such as finance, economics among others and therefore cannot be adequately covered in one study. FDIs exist in all sectors of the economy be it in manufacturing, mining, tourism, education, the health sector among other sectors.

⁵²Paul Hague, 'An Introduction to Research Methodologies', in *A Practical Guide to Market Research* (Stockport, United Kingdom: Grosvenor House Publishing Ltd, 2006), 41.

In this study, the researcher proposes to limit themselves to analysing the efficacy of Kenya's legal framework for environmental management of FDIs in the mining industry and using Kwale County in Kenya's coast region as a case study.

In this sense, this study endeavours to examine the interface between mining, management of the environment as well as the effectiveness and implementation of the existing legal framework.

This study will also make a comparative analysis of South Africa's policy, legal and institutional framework on FDI and how it has impacted on the environmental management in the South African mining sector. Lessons will be drawn from this exposition to aid in formulating objective recommendations on how Kenya's legal framework for environmental management of FDI can be reformed to enhance environmental protection within the mining industry.

1.11 CHAPTER BREAKDOWN

This study is presented in five chapters as follows:

CHAPTER ONE: INTRODUCTION

Chapter one introduces the background to the issues that will be the focus of this study. The chapter outlines in general terms the importance of FDI in Kenya and particularly in the mining industry. The chapter also includes the statement of the problem, research questions, research objectives, hypotheses, conceptual framework, justification for study, literature review, research methodology, and limitations of the study as a foundation for analysis of the other chapters in the study.

CHAPTER TWO: CONCEPTUAL ASSESSMENT OF FOREIGN DIRECT INVESTMENT AND ENVIRONMENTAL MANAGEMENT

Chapter Two analyses the relationship between FDI and environment. The overriding objective in this chapter is to demonstrate that over-emphasis on promotion of FDI and undervaluing environmental management conservation would undermine the development gains achieved through FDI.

CHAPTER THREE: LEGISLATIVE FRAMEWORK GOVERNING FDI AND ENVIRONMENTAL MANAGEMENT

Chapter Three examine the legal framework for FDIs and environmental management in Kenya. In this analysis, this chapter will offer an extensive critique on the efficacy of the existing law in providing appropriate enforcement, accountability and monitoring mechanisms for ascertaining compliance with these laws. Further this chapter will consider how these laws were applied in regulating mining of titanium in Kwale county.

CHAPTER FOUR: CRITICAL ANALYSIS OF SOUTH AFRICAN LEGAL FRAMEWORK ON FDI AND ITS IMPACT ON ENVIRONMENTAL PROTECTION IN THE MINING INDUSTRY

This chapter examines the legal and South African policy framework relating to FDI in their mining industry. This chapter will demonstrate how in South Africa environmental consideration is a key pillar in determining whether or not FDI is authorized in mining projects.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

This chapter provides a summary of the key findings in this study and a conclusion of the entire research taking into consideration whether or not the objectives of the study have been met, research questions answered and hypothesis proved. This chapter will advocate for a legislative

reform agenda on how Kenyan FDI and environmental laws can be adapted to provide appropriate enforcement mechanisms to enhance environmental conservation and management.

CHAPTER TWO: CONCEPTUAL ASSESSMENT OF FOREIGN DIRECT INVESTMENT AND ENVIRONMENTAL MANAGEMENT

2.1 INTRODUCTION

In this chapter, the researcher will present an extensive conceptual assessment of the interplay between FDI and environmental management. The aim here is to show that the relationship between FDI and environment especially in the mining sector is worth recognition. The two go hand in hand and where promotion of FDI is paramount at the expense of environment protection consideration. The benefits attributed to FDI will be moot compared to the environmental risks that will ensue.

2.2 FOREIGN DIRECT INVESTMENTS (FDIs)

Developing countries often face challenges in financing their development projects and therefore have to look elsewhere. One of the sources of financing being through FDIs.

As previously defined, FDIs are “an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI) enterprise or affiliate enterprise or foreign affiliate.”⁵³

To further expound on this, FDIs are said to be a cross border investment in which the investor from a foreign economy acquires a lasting interest in the host economy.⁵⁴ It is through FDIs in

⁵³ United Nations Conference on Trade and Development, ‘World Investment Report 2007: Transnational Corporations, Extractive Industries and Development’ (United Nations 2007) Sales No. E.07.II.D.9.

⁵⁴ Kelvin Mwangi Maingi, ‘The Effect of Foreign Direct Investments on Economic Growth in Kenya’ (University of Nairobi, 2014), available at <http://chss.uonbi.ac.ke/sites/default/files/chss/Kelvin%20Mwangi/IMPACT%20OF%20FOREIGN%20DIRECT%20INVESTMENT%20ON%20ECONOMIC%20GROWTH%20IN%20KENYA.pdf> accessed on 14th August 2016.

various host economies that the parent enterprise becomes a multinational.⁵⁵ Additionally, once foreign companies settle in the host country, they put in equity capital and even post-profit, they may reinvest their earnings with the purpose of growing the local enterprise and increase of the stake of the investor.⁵⁶

In Africa, in general, FDIs are traditionally in the oil and natural resources sectors and agriculture which have a direct impact on the environment.

Foreign firms exercise many different ways of holding assets in foreign countries. This is one of the many reasons why it is difficult to give a universally accepted definition of FDI. This therefore means that the concept of FDIs is quite vague and as a result more attention is given to the purpose and results of a foreign investment and the recommended implementation is usually very specific.⁵⁷ Generally, for there to be foreign direct investment, there has to be a foreign entity, usually referred to as the parent enterprise on one end, and in the host economy its affiliates where it has a reportable interest.

The economic benefits of FDIs to host countries cannot be understated. This is because it provides capital, technology, foreign exchange and enhances access to foreign markets and competition.⁵⁸

2.1.1 Types of FDIs

According to John Harry Dunning, there are three main types of FDIs.⁵⁹ These are:

⁵⁵Valentino Piana, 'Foreign Direct Investment' (Economics Web Institute, 2005), available at, <http://www.economicwebinstitute.org/glossary/fdi.htm> accessed on 14th August 2016.

⁵⁶Kelvin Mwangi Maingi, 'The Effect of Foreign Direct Investments on Economic Growth in Kenya' (n 52).

⁵⁷Robert E. Lipsey, 'Foreign Direct Investment and the Operations of Multinational Firms: Concepts, History, and Data', NBER Working Paper Series (National Bureau of Economic Research, December 2001).

⁵⁸Khondoker Abdul Mottaleb and Kaliappa Kalirajan, 'Determinants of Foreign Direct Investment in Developing Countries: A Comparative Analysis' (Crawford School of Economics and Government, 2010), https://asiaandthepacificpolicystudies.crawford.anu.edu.au/acde/asarc/pdf/papers/2010/WP2010_13.pdf.

⁵⁹John Harry Dunning, *Multinational Enterprises and the Global Economy* (Harlow, Essex: Addison Wesley Publishing Company, 1993).

1. **Market-seeking FDI**s: these serve to seek local and regional markets by enhancing the local market size growth and production.⁶⁰
2. **Resource-seeking FDI**s: this occurs when foreign companies move to the host state seeking resources not available in their countries. Cost considerations are usually very important when deciding to make such investments.⁶¹
3. **Efficiency-seeking FDI**s: this occurs where foreign investors move into other countries who in their opinion have better and suitable governance frameworks from which their operations can benefit.⁶²

2.1.2 The Determinants of FDI

The determinants of FDI are three-fold; business facilitation, political factors and economic factors.⁶³ These determinants are to be considered by both the foreign investor as well as the host economy. The foreign investor will have to consider if the factors work in its favour and encourage it to invest. The aim of an investor when investing is to maximize profits; therefore, it must satisfy itself that the conditions in the host country work to its favour. On the other hand, it is the host country's responsibility to establish measures that will make it a suitable investment destination as discussed below.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³United Nations Conference on Trade And Development (UNCTAD), 'World Investment Report (WIR) 1998: Trends and Determinants' (New York and Geneva: United Nations, 1998).

2.1.2.1 Economics factors

Foreign investors often prefer to invest in countries that guarantee low input, operations and hidden costs. This is because in such an environment, profits are often higher.⁶⁴ This study will briefly list the macroeconomic factors considered by a foreign enterprise seeking to invest.

In deciding whether to invest in a host country, it is important to consider the wage rates and labour skill levels of the locals. A firm will prefer to invest in a foreign country and thereafter outsource labour to a host country with low wages in order to reduce the production costs which inevitably increase profits.⁶⁵ The minimum wages in a country will largely be determined by the skills possessed by its population. Each industry has its own required skills that should be possessed by its workers; a highly mechanized industry will require an equally skilled worker. Highly skilled workers will in turn demand higher wages, with the inverse being true for lowly skilled workers who will accept minimum wages. Therefore, a foreign firm will have to consider if the intended host country's population possess the skills required for the production of its goods and if so, if the wages to be paid to the workers will be minimal to explain the need for outsourcing.

The exchange rate valuation between the parent country of the investor and the host country also has to be considered. A weaker exchange rate is more likely to increase FDIs since foreign investors will readily take advantage of the relatively low prices that they will incur when setting up affiliates and acquiring facilities as well as reduced costs of production.⁶⁶ It is relatively cheap to acquire assets in a host country with a weak rate which translates to

⁶⁴Khondoker Abdul Mottaleb and Kaliappa Kalirajan, 'Determinants of Foreign Direct Investment in Developing Countries: A Comparative Analysis'.

⁶⁵Tejvan Pettinger, 'Factors That Affect Foreign Direct Investment (FDI)', *Economics Help: Helping to Simplify Economics*, 29 January 2016, available at <http://www.economicshelp.org/blog/15736/economics/factors-that-affect-foreign-direct-investment-fdi> accessed on 9th September 2016.

⁶⁶James P. Walsh and Jiangyan Yu, 'Determinants of Foreign Direct Investment: A Sectoral and Institutional Approach', IMF Working Paper (International Monetary Fund, July 2010).

increased profits upon re-exporting of the products to other markets.⁶⁷ On the hand, a stronger exchange rate will inevitably act as an investment barrier; an investor will not readily invest in a country whose exchange rate will result in the enterprise incurring more or less the same costs it would if it invested in its home country.

An enterprise will often target to sell its product in the host country and therefore the population size and scope of economic growth are very important in attracting investment.⁶⁸ A large host country in terms of population is likely to get FDIs due to its perceived readily available market and a potential demand for products.⁶⁹ A host country with a growing economy means that its population has a greater buying power and therefore not only will there be a ready market for the products but also the population will be able to buy the products.

The other macroeconomic factors to be considered by an investor are the GDP of the host country and the general health of its banking systems as well as the loan interest rates.⁷⁰

2.1.2.2 Political Factors

The main factors to consider are the political stability and administrative efficiency of the host country. Foreign investors will consider the stability of the host country as one of the risks of investing. Countries with an uncertain political situation, economic crisis and sanctions will be a major disincentive and will consequently hinder investment.⁷¹ Additionally, the level of corruption and mistrust in institutions, also discourage foreign investors.⁷²

⁶⁷ Ibid.

⁶⁸Tejvan Pettinger, 'Factors That Affect Foreign Direct Investment (n 64).

⁶⁹James P. Walsh and Jiangyan Yu, 'Determinants of Foreign Direct Investment: A Sectoral and Institutional Approach'.

⁷⁰Levin Institute- The State University of New York, 'Factors Influencing Foreign Investment Decisions', *Globalization 101*, 2016.

⁷¹Tejvan Pettinger, 'Factors That Affect Foreign Direct Investment (n 64).

⁷² Ibid.

Good governance is the foundation of administrative efficiency which facilitates economic growth. In the reverse, poor governance encourages corruption which racks up investment costs and depreciates profits.⁷³

The political situation in the intended host country is important for determining whether investing in the country will yield the anticipated returns. Political instability discourages investment in any particular country.⁷⁴ Politically unstable or volatile countries and poor governance tends to lead to unrest which in turn increase on the risks to the assets and investments of a foreigner.⁷⁵

2.1.2.3 Business Facilitation

This refers to the steps taken by the host country to ensure it has a conducive environment that attracts and encourages foreign investors to consider it as an ideal destination for investment. In addition to a stable and efficiently governed host country, an investor will look at the taxation rates and transport and infrastructure in the host country.

In attracting foreign investment, the host country must put in place tax incentives and low tax rates that will mean the investors will get higher profits. Foreign investors will seek to invest in a country with low corporation tax rates as they offer fiscal incentives in the form of tax rate reductions due to allowable cost deductions for certain specific allowances, set-up costs, training costs as well as research and development. For instance, in Kenya, supplies of services or goods for direct and exclusive use in mining exploration or prospecting are exempt from

⁷³James P. Walsh and Jiangyan Yu, 'Determinants of Foreign Direct Investment: A Sectoral and Institutional Approach' (n 65).

⁷⁴Tejvan Pettinger, 'Factors That Affect Foreign Direct Investment (n 64).

⁷⁵James P. Walsh and Jiangyan Yu, 'Determinants of Foreign Direct Investment: A Sectoral and Institutional Approach' (n 65).

V.A.T. upon recommendation by the Cabinet Secretary for Mining, the importation of capital goods, that is; plant, machinery, and equipment, is also exempt from V.A.T.⁷⁶

Another key factor in the desirability of a country as an investment destination is the transportation costs and the levels of infrastructure that the host country has already put in place.⁷⁷ An efficient transportation system provides adequate access to labour, retail, manufacturing and housing markets.⁷⁸ Thus, the adequacy of an efficient transport system is a vital determinant in attracting investors.⁷⁹ Further, states with access to the sea are more likely to attract foreign investment since it will greatly reduce transportation costs and the costs of importing equipment, raw material as well as the cost of exporting the products to other markets when compared to a landlocked country.⁸⁰

2.3 THE ENVIRONMENT AND ENVIRONMENTAL MANAGEMENT

This study is also specifically concerned with the efficacy of Kenya's legal framework for environmental management of FDI. To understand the impact of FDIs on the environment it is important to first examine the concepts and meaning of the environment. To this end, this study shall employ the use of the definition given under EMCA⁸¹ which defines the environment "to include the physical factors of the surroundings of human beings including land, water, atmosphere, sound, odour, taste, the biological factors of animals and plants and the social factors of aesthetic and includes both the natural and the built environment."⁸²

⁷⁶ Kenya Investment Network, 'Institutional, Legal & Regulatory Framework Governing Mining in Kenya', *Kenya Investment Network*, n.d., https://investinkenya.co.ke/main/view_article/48 accessed on 10th September 2016.

⁷⁷Tejvan Pettinger, 'Factors That Affect Foreign Direct Investment (n 63).

⁷⁸Mustapha Muktar, 'Impact Of Transportation On Economic Growth: An Assessment of Road and Rail Transport Systems', *Dr. Mustapha Muktar Archives*, 26 January 2011, <http://mustaphamuktar.blogspot.co.ke/2011/01/impact-of-transportation-on-economic.html> accessed on 10th September 2016.

⁷⁹ Ibid.

⁸⁰Tejvan Pettinger, 'Factors That Affect Foreign Direct Investment (n 64).

⁸¹Act, No. 8 of 1999.

⁸²Ibid. Section 2.

Similarly, environmental management is defined to include “the protection, conservation and sustainable use of the various elements or components of the environment.”⁸³

The environment and natural resources are extremely vital in achieving economic growth and development in any country in that it is from the environment that industries get the raw materials necessary to be used in various industries.⁸⁴

Environmental management is not easy to define, it is used to refer to a variety of things in relation to the environment and human societies; that is, it can be used to mean a goal, vision, attempts to steer a process, the application of tools or a philosophical exercise to establish new perspectives towards the environment.⁸⁵ It concerns itself with the interactions of human beings with the environment and how they utilize it with particular emphasis on sustainable utilization of the environment. In other words, it can be said that environmental management is concerned with understanding the functioning of the earth system, the relation of humankind to the environment as well as monitoring of environmental changes all in an attempt to maximize human benefit and to minimize environmental degradation due to human activities.⁸⁶

Environmental management is a broad and rapidly evolving discipline, its application includes; managing environmental pollution, environmental risk management, management of coastal and estuaries as well as countryside management.⁸⁷ In other words, environmental management is all about ensuring that an optimal balance is achieved between environmental protections and allowing human liberty.⁸⁸

⁸³Ibid. Section 2.

⁸⁴Tim Everett et al., ‘Economic Growth and the Environment’, Defra Evidence and Analysis Series (Department for Environment Food and Rural Affairs (UK), March 2010).

⁸⁵Chris J. Barrow, *Environmental Management for Sustainable Development*, 2nd Edition (Routledge Taylor & Francis Group, 2006).

⁸⁶Ibid.

⁸⁷Ibid.

⁸⁸Ibid.

Environmental management has been divided into two broad categories which are either reactive management or proactive/ anticipatory management.⁸⁹ Reactive environmental management on one hand is in its nature problem solving in that it is undertaken in response to an environmental crisis with no attempts being made to prevent future crises; while on the other hand proactive environmental management anticipates problems as well as initiating projects to improve and protect the environment.⁹⁰

2.4 THE IMPACT OF FDI ON THE ENVIRONMENT

FDI as well as all other forms of investments leading to economic growth have both positive and negative impacts on the environment. Protection of the environment and economic growth and activities (which includes FDIs) are more often than not conflicting in that when a state chooses to promote either of the two interests it inevitably causes the decrease in the activities of the other. It can therefore be argued that in as much as there are positives in encouraging FDIs the negatives tend to outweigh the positives.

Environmental pollution and degradation directly affects the quality of life and ultimately threatens the survival of mankind. The increase of economic activities, in particular FDIs, as a result of globalization has resulted in an increase in the levels of environmental degradation.⁹¹ In the recent past, it has been observed that an increase of economic activities in the mining

⁸⁹Mehedi Mudasser, 'Environmental Management: Concept, Types and Importance', *Academia.edu*, 17 March 2014, https://www.academia.edu/7845844/Environmental_Management_Concept_Types_and_Importance_Course_No._URP_3131_Course_Title_Environmental_Management_and_Planning_Submitted_by accessed on 14th September 2016.

⁹⁰Ibid.

⁹¹Pasquale Paziienza, *The Relationship Between FDI and the Natural Environment*, SpringerBriefs in Economics (Springer International Publishing, 2014).

sector of most countries has been directly proportional with the acceleration of environmental degradation and destruction.⁹²

Mining has a permanent impact on the environmental and over-time lead to exhaustion of natural resource.⁹³ Impacts on the environmental occur during all the phases of a mining project, that is; during exploration, disposal of waste, ore processing and plant operation, tailings (processing wastes) management, and construction of camps and towns.⁹⁴

In an attempt to explain the relationship between the quality of the environment and economic growth, the World Bank came up with the Environmental Kuznets Curve (EKC)⁹⁵ which is a hypothetical illustration which depicts that an over-emphasis on economic development at the expense of environmental protections has fatal consequences.⁹⁶

Fig 2: The Hypothetical Environmental Kuznets Curve

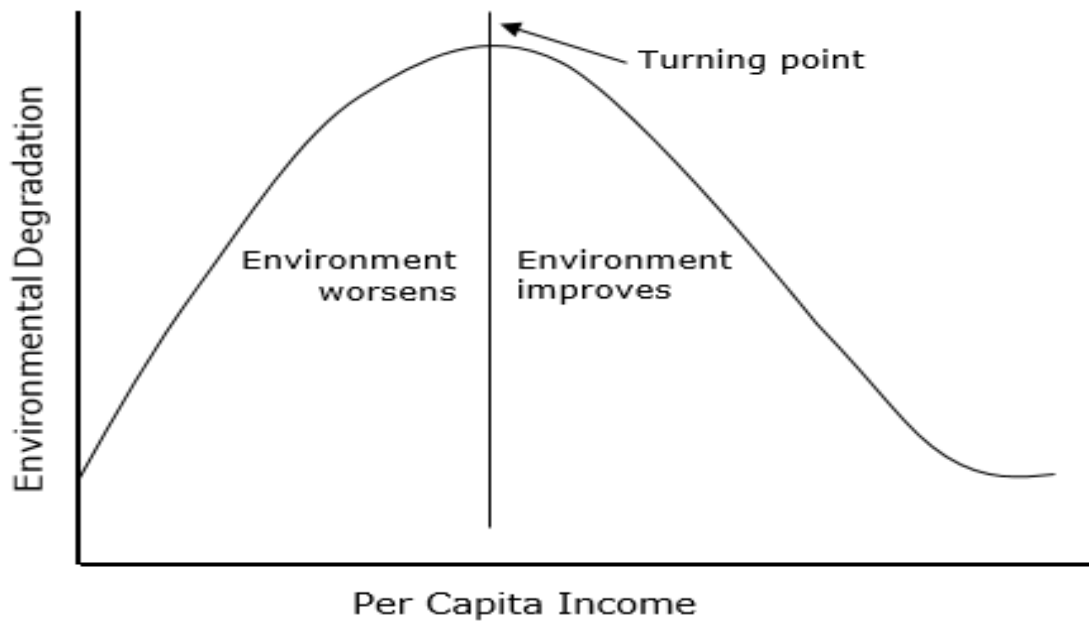
⁹²Mizan Bin Hitam and Halimahton Binti Borhan, 'FDI, Growth and the Environment: Impact on Quality of Life in Malaysia' (ASEAN Conference on Environment-Behavior Studies, Bangkok, Thailand: Elsevier Limited, 2012). Pasquale Paziienza, *The Relationship Between FDI and the Natural Environment*, SpringerBriefs in Economics (n 90).

⁹³Colin Noy Boocock, 'Environmental Impacts of Foreign Direct Investment in the Mining Sector in Sub-Saharan Africa', in *Conference on Foreign Direct Investment and the Environment Lessons to Be Learned from the Mining Sector* (OECD Global Forum on International Investment, OECD Headquarters, Paris, France, 2002).

⁹⁴ Ibid.

⁹⁵ The hypothesis was first advanced by economist Simon Kuznets in the mid-20th century.

⁹⁶World Bank. 1992. *World Development Report 1992: Development and the Environment*. New York: Oxford University Press. © World Bank.



The EKC has over time proved to be very useful in examining the impact of economic activities such as FDIs have on the environment. However, being that it is as a result of empirical and economic studies, this study shall not delve into its merits or demerits. This study shall only infer from it the fact that various scholars have acknowledged the fact that in order to achieve economic growth as a result of FDIs and other economic activities; it is inevitable that such activities shall result in environmental degradation. It is due to this fact that it has been argued that developing countries such as Kenya have to lower their environmental standards due to the potential returns that will come their way as a result of increased FDIs.

2.5 CONCLUSION

In this chapter, it was established that FDI is a catalyst for development. However, with the growth of FDI inflows in various countries, a debate has arisen on the benefits of positive FDI that not only focus on economic growth but also advocate for maximizing on environmental protection and conservation. Overtime, public interest has focused on the impact of mining activities on the environment especially where foreign companies contributing to degeneration and/or protection of the environment unchecked.

While mining operations often improve the development growth of a country, they also come with devastating consequences that result in severe degradation of the environment. In this sense since most developing countries depend on FDI in exploiting their natural resources, operations of foreign mining companies may lead to both positive and significant negative consequences. Thus, the correlation between environmental protection and FDI cannot be gainsaid. As a result, in countries that lack effective environmental regulations and transparent public governance especially in supplementing FDI regulation, there is often the risk that the environment and social welfare of those countries will be at great risk.

CHAPTER THREE: LEGISLATIVE FRAMEWORK GOVERNING FDI AND ENVIRONMENTAL MANAGEMENT

3.1 INTRODUCTION

In this chapter, the researcher will extensively In this regard, this chapter shall first tackle the laws governing FDIs in the Kenyan mining industry and thereafter the legal framework on environmental management. The analysis in this chapter is to ascertain whether the legal framework in Kenya adequately provides for environmental protection consideration as a condition precedent for allowing FDI. However, this chapter will go further to ascertain whether there are in place proper mechanism for the enforcement of the above mentioned legal framework. In this endeavour, this chapter will consider how these laws were put in action especially in respect to FDI projects in the mining of titanium in Kwale county.

3.2 THE CONSTITUTION OF KENYA, 2010.

The Constitution is the supreme law of the Republic of Kenya and it is from it that all other laws derive their legitimacy. It is therefore not possible to examine the legislative framework without a look at the supreme law.

To all individuals the right to life is granted and guaranteed. Of importance to foreign investors is that the Constitution guarantees the right to life, movement and property to every person within Kenya.¹However, this right is not directly connected to the mining industry. The purpose of referring to this right is that, when investing in Kenya, investors will feel assured that they will be safe and at no point during their stay will their lives be arbitrarily threatened or deprived. This is closely linked with the freedom and security of the person which cannot

¹'Constitution of Kenya' (2010) Article 26.

be deprived of arbitrarily or without just cause.² It is imperative that when choosing to invest in Kenya, foreign investors are assured of their safety. Its purpose is to distinguish the country from other nations where the government undermines the rights and liberties of its people thereby increasing the risks of investing in such nations.

Among the economic benefits of FDIs, the host countries benefit from the foreign investors who bring advanced machinery and technologies to assist in the mining process. The Constitution therefore acknowledges the important role played by science and technology in the development of the nation as well as promoting the intellectual rights.³ This ensures that investors have faith that when investing in the country their investments enjoy the protection of the supreme law.

The affiliates of the parent enterprise are either acquired or set up in Kenya and are therefore citizens bestowed with all the rights granted to a legal person. One of these rights is the right to enter, remain and reside anywhere in Kenya.⁴ This can be interpreted to mean that as a citizen, the affiliates in an FDI are given the right to invest and set up industries anywhere in Kenya for the purposes of mining. Since the affiliate is a Kenyan citizen, it is able to choose on the different land tenures in Kenya and can hold land registered under a freehold or leasehold tenure which is more beneficial to ensure a lasting interest. The 99-year lease limit imposed on land holding by non-citizens would apply if the foreign enterprise held land in itself.⁵

As earlier stated, whereas FDIs entail long-term investment relationships, interest and control by a resident entity in a foreign economy mining is also an intrusive industry that requires

²Ibid. Article 29.

³Ibid. Article 11 (1).

⁴Ibid. Article 39 (3).

⁵Ibid. Article 65 (1).

access to the land where the mineral deposits are present. For this purpose, the Constitution allows affiliates to acquire and own property in any part of Kenya on a lease-hold basis.⁶

The land that investors acquire for their mining activities forms part of the environment and the constitution grants every guarantee the right to healthy and clean environment.⁷ Clean and safe water is an integral aspect of a clean environment, in acknowledging this; the constitution makes it an economic and social right for the use of land in an efficient, productive and sustainable manner.⁸

For the purpose of FDIs in the mining industry, this research shall focus on the provisions on the environment and natural resources. Article 62 vests the ownership of all natural resources including but not limited to oil, gas and all mineral deposits on the government of Kenya in who holds it in trust for the people of Kenya. In the event minerals and mineral oils are found on private or community land, Article 40 (3), allows the state to exercise eminent domain and deprive the owners of such land under compulsory acquisition on the condition that a public purpose is established and the legal proprietor is compensated promptly.

With respect to the environment, the state has an obligation to *inter alia* ensure; “sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environment impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment and finally an obligation to utilise the environment and natural resources for the benefit of the people of Kenya.”⁹ In addition to the

⁶Ibid. Article 40.

⁷Ibid. Article 42.

⁸Ibid. Article 43 (1) (d).

⁹Ibid. Article 69 (1).

state obligations, there is a duty imposed on every citizen to work with the state to preserve the environment and ensure sustainable use and exploitation of natural resources.¹⁰

The Constitution acknowledges the role of land and the environment in the development of the country but requires that it be used and managed efficiently and sustainably.¹¹ This is to ensure that the environment is protected not only for present generations but to protect the rights of future generations which will require to utilise the same resources.¹²

3.3 THE INVESTMENT PROMOTION ACT, 2004.¹³

This Act was enacted with the purpose of promoting and facilitating investment by aiding investors to obtain the necessary licences to invest and to obtain and benefit from other related incentives. The Act offers definition to terms in this study such as defining a foreign investor to be either; “a natural person who is not a citizen of Kenya, a partnership in which the controlling interest is owned by a person or persons who are not citizens of Kenya or a company or other body corporate incorporated under the laws of a country other than Kenya.”¹⁴ It further defines “an investment to mean the contribution of local or foreign capital by an investor, including the creation or acquisition of business assets by or for a business enterprise and includes the expansion, restructuring, improvement or rehabilitation of a business enterprise.”¹⁵

The local affiliate of the foreign enterprise can be viewed to fit into the definition of a local investor which in the Act is defined to be either “a company incorporated under the laws of Kenya, in which the majority of shares are held by a person who is a citizen of Kenya or a trust

¹⁰Ibid. Article 69 (2).

¹¹Ibid. Article 10 (2) (d).

¹² Ibid. Article 42 (a).

¹³Chapter 485B, Laws of Kenya.

¹⁴The Foreign Investments Protection Act Chapter 518, Laws of Kenya, Section 2.

¹⁵Ibid.

or trust corporation established under the laws of Kenya, in which the majority of trustees and beneficiaries are citizens of Kenya.”¹⁶

Both local and foreign investors are required to apply to the Kenya Investment Authority¹⁷ for an investment certificate.¹⁸ “An applicant shall be entitled to an investment certificate if the application is complete and satisfies the applicable requirements under the Act, the amount to be invested by a foreign investor is at least \$100,000 (one hundred thousand United States of America dollars) or the equivalent in any currency or in the case of a local investor at least Kshs. 1,000,000 (one million shillings) or the equivalent in another currency and finally there is a requirement that the investment and the activity related to the investment are lawful and beneficial to Kenya.”¹⁹

Of particular concern to this study is the role of the Kenya Investment Authority when it relation to promoting and attracting prospective investors to choose Kenya as their investment destination. In promoting and facilitating investment, the Authority is mandated to aid both local and foreign investors by: “issuing investment certificates as stated earlier; assisting in obtaining any necessary licences and permits; assisting in obtaining incentives or exemptions under the Income Tax Act, the Customs and Excise Act, the Value Added Tax Act or other legislation; providing information on investment opportunities or sources of capital.”²⁰

In addition to these functions it is the duty of the Authority to “promote, both locally and internationally, the opportunities for investment in Kenya; review the investment environment and make recommendations to the Government and others, with respect to changes that would

¹⁶Ibid.

¹⁷ The Kenya Investment Authority as established in Section 14 of the Act came in place to replace and continue the functions of the Investment Promotion Centre established under the Investment Promotion Centre Act Cap 485 (repealed).

¹⁸The Investment Promotion Act Cap 485B Laws of Kenya Section 3.

¹⁹Ibid. Section 4.

²⁰Ibid. Section 15.

promote and facilitate investment, including changes to licensing requirements; facilitate and manage investment sites, estates or land together with associated facilities on the sites, estates and land; appoint agents within the country and in any other country to carry out certain functions on its behalf, as it may consider necessary; carry out such other activities as, in the Authority's opinion, will promote and facilitate investment.”²¹

3.4 THE FOREIGN INVESTMENTS PROTECTION ACT²²

Once foreign investors decide on Kenya as their investment destination, it is imperative that they are assured of the protection of their rights and investments in the host country. This Act was enacted with the aim of protecting specific approved foreign investments.

This Act grants the Cabinet Secretary responsible for finance the power to issue certificates to foreign nationals who are desirous to invest their assets in Kenya. In this sense the proposed investment is an approved enterprise upon the issuance of the certificate.²³

An example of the protections granted to foreign investments is the protection from deprivation of property which is an assurance that “no approved enterprise or any property belonging thereto shall be compulsorily taken possession of, and that no interest in or right over such enterprise or property shall be compulsorily acquired, except in accordance with the provisions concerning compulsory taking of possession and acquisition and the payment of full and prompt payment of compensation.”²⁴ In addition to this assurance, in the event compulsory acquisition is necessary, the Schedule of the Act sets out conditions that must be fully adhered

²¹Ibid.

²²Chapter 518, Laws of Kenya.

²³Ibid. Section 3.

²⁴Ibid. Section 8.

to and in the event the holder of such rights wishes to challenge the acquisition, they have a right to seek redress in the High Court.

In addition to this general protection, the Act grants the Cabinet Secretary in charge of finance the power to enter and make special arrangements for investment promotion and protection by notice in the Gazette.²⁵

3.5 THE MINING ACT, 2016 ²⁶

This is the primary statute that provides the legal regulatory and institutional framework guiding the Kenyan mining sector.²⁷ The Act is anticipated to, among other things, streamline Kenya's mining sector, inject predictability and certainty by providing clear guidance on mining activities that is vital for the rapid development of the mining sector as well as ensuring environmental conservation.²⁸

In an overview, the Act introduces; “legalization of artisanal miners and transparency, accountability through use online licensing and management of mineral rights and permits.”²⁹ It also introduces community development agreements³⁰ which require sharing of royalties with the national government, the county governments and the local communities.”³¹

The Mining Act has a very broad scope but for the purpose of this chapter, the research shall be restricted to the provisions that directly apply to FDI in titanium mining and environmental

²⁵Ibid. Section 8B.

²⁶Act, No. 12 of 2016.

²⁷Ministry of Mining, 'Kenya Mining Investment Handbook 2015' (Nairobi: Republic of Kenya Ministry of Kenya, 2015), http://www.mining.go.ke/images/banners/Kenya_Mining_Investment_Handbook.pdf.

²⁸Ministry of Mining, 'The New Mining Act 2016 Handover to CS Mining', *Ministry of Mining*, 2016, <http://www.mining.go.ke/press-release.html>.

²⁹ Ministry of Mining, 'The New Mining Act 2016 Handover to CS Mining', Ministry of Mining, 2016, available at, <http://www.mining.go.ke/press-release.html> accessed on 20th October 2016.

³⁰ Community Development Agreements as defined in Section 2 of the Mining Act refer to agreements entered into between a large-scale mining license holder and the community living around its operation.

³¹Ministry of Mining, 'The New Mining Act 2016 Handover to CS Mining' (n 31).

management. Titanium is listed as a member of the minerals categorized as in the base and rare metals group. Similar to the provision of the Constitution, this Act vests ownership of all mineral deposits within the geographical jurisdiction of Kenya in the national government in trust for the people of Kenya regardless of any land ownership right by any individual in which these deposits are found.³²

The Mining Act differentiates between small and large-scale operations which has a bearing on the type of mineral right³³ to be granted.³⁴ Further, “the Cabinet Secretary has the power designate an area to be an area reserved exclusively for small scale and artisanal mining operations.”³⁵ Anything that does not fall within these parameters is then a large-scale operation.

The eligibility for mineral rights in small scale operations is limited to individuals who are Kenyan citizens or in the case of a body corporate, not less than 60% of its shareholding must held by citizens of Kenya.³⁶ For FDIs, the local affiliates are citizens of Kenya and therefore the only requirement to be met is ensure that its membership meets or exceeds the 60% threshold set out where it intends to invest in a small-scale operation. However, FDIs are largely limited to large-scale operations due to the complexity of the process and also the investments required.

Section 10 of the Mining Act restricts the acquisition of mineral rights in Kenya to persons who have been granted a permit or licence in accordance the Act. For an affiliate in FDIs which is a body corporate to acquire mineral rights, it must be registered and established in Kenya

³²The Mining Act, section 6.

³³ Mineral rights as defined in section 2 of the Act refer to either “a prospecting license; a retention license; a mining license; a prospecting permit; a mining permit; or an artisanal permit.”

³⁴The Mining Act, section 122.

³⁵Ibid. Section 13.

³⁶Ibid. Section 124.

and ensure that its directors demonstrate “technical capacity, expertise, experience and financial capacity required for mining.”³⁷

An application for mineral rights large scale operations is made to the Cabinet Secretary who acts on the recommendation of the Mineral Rights Board³⁸ to either approve or reject an application.³⁹ The Cabinet Secretary “is required upon receipt of the application for the grant of a mineral right to give notice in writing to: the land owner or lawful occupier of the land where the mineral is located, the community and the relevant county government within whose jurisdiction the minerals are located.”⁴⁰ The notice must be published in a newspaper of wide circulation, the Gazette and in the offices of the County Government stating the proposed boundaries of the land required, all at the applicant's expense.⁴¹ The holder of the mineral rights must then compensate the owners of the land in order to use their land.⁴²

Mineral rights on community land cannot be granted without the consent of either; the authority concerned with the administration and management of community land granted by the registered owners or the National Land Commission in relation to community land that is unregistered.⁴³

Where compulsory acquisition of land is required for prospecting or mining, the Cabinet Secretary is empowered to undertake the process on behalf of the government to vest the rights or interests in such land on the government.⁴⁴

³⁷Ibid. Section 11.

³⁸ The Mineral Rights Board is established under Section 30 of the Act.

³⁹The Mining Act, 2016. Section 33.

⁴⁰Ibid. Section 34.

⁴¹Ibid.

⁴²Ibid. Section 99.

⁴³Ibid. Section 38.

⁴⁴Ibid. Section 40.

When granting mineral rights, the Cabinet Secretary must ensure that the following conditions are met; “the protection of the mineral interests; the protection of the environment; community development; safety of prospecting and mining operations; health and safety of persons undertaking those operations; the protection of the lawful interests of the holders of any other mineral right; and the maximum number of blocks a person or a company may hold.”⁴⁵

Upon being granted mineral rights, the holder is required to exercise the rights reasonably and responsibly and must ensure they undertake the necessary measures to “prevent wasteful mining practices and ensure that their prospecting or mining operations are carried out in accordance with mining best practice.”⁴⁶ The failure to comply constitutes a criminal offence.

A foreign investor intending on FDIs in mining and being a holder of a mineral right must know that it is a requirement for local citizen to be given priority but where it is absolutely necessary to acquire the services of a foreigner to perform complex tasks ensure that work towards training Kenyans in a bid to replace technical non-citizen employees.⁴⁷

The Cabinet Secretary is empowered “to negotiate and enter into a mineral agreement with the holder of a mining licence where the proposed investment exceeds the limit of \$500,000,000 (five hundred million United States dollars).”⁴⁸ It is however mandatory for the mineral agreement to include terms and conditions relating to *inter alia*, “the environmental obligations and liabilities, subject to the requirement of the EMCA.”⁴⁹ A holder of mineral rights can only export the titanium mined upon acquiring an export permit.⁵⁰

⁴⁵Ibid. Section 42.

⁴⁶Ibid. Section 43.

⁴⁷Ibid. Section 47.

⁴⁸Ibid. Section 117.

⁴⁹ Ibid.

⁵⁰ibid, section 171.

There is a part of the Act dedicated to health, safety and the environment. The Act expressly states that environmental laws shall prevail when carrying out mining and that no person is exempt from complying with any law concerning the protection of the environment.⁵¹

Among the requirements of being granted a mining license, the applicant must procure “an approved environmental impact assessment licence, a social heritage assessment and environmental management plan in respect of the proposed mining operations.”⁵² Similarly, the details of the approved environmental impact assessment report, social heritage impact assessment and environmental management plan must be included in the mining license.⁵³ Site restoration and mine closure plans are also licencing requirements.⁵⁴

While carrying out mining activities, the holder of a permit or license, “shall use the land in accordance with the terms of the permit or licence and shall ensure the sustainable use of land through restoration of abandoned mines and quarries; that the seepage of toxic waste into streams, rivers, lakes and wetlands is avoided and that disposal any toxic waste is done in the approved areas only; that blasting and all works that cause massive vibration is properly carried out and muffled to keep such vibrations and blasts to reasonable and permissible levels in conformity with the Environmental Management and Coordination Act; and that upon completion of prospecting or mining, the land in question shall be restored to its original status or to an acceptable and reasonable condition as close as possible to its original state.”⁵⁵

In order to ensure adherence to environmental laws in mining, the act introduced Environment Protection Bonds⁵⁶ whereby an applicant for a licence, if so required shall “provide a bond or

⁵¹Ibid. Section 176.

⁵²Ibid. Section 103. Also see Section 176(2).

⁵³Ibid. Section 106.

⁵⁴Ibid. Section 180.

⁵⁵Ibid. Section 179.

⁵⁶ The Environmental Protection Bonds are in a form and for an amount as may be determined by the Cabinet Secretary having regard to the particular characteristics of the project.

some other form of financial security sufficient to cover the costs associated with the implementation of the environmental and rehabilitation obligations.”⁵⁷

The holder of a mineral right shall pay royalties “in respect of the various mineral classes won by virtue of the mineral right distributed as follows; 70% to the national government; 20% to the county government; and 10% to the community where the mining operations occur and should make returns of the royalties paid.”⁵⁸ Failure to pay royalty within the “prescribed period allows the Cabinet Secretary may prohibit the disposal of any mineral or mineral product from the mining area concerned, or from any other mining area held by that mineral right holder as well as suspending the respective licence or permit.”⁵⁹

The Cabinet Secretary has the power to appoint inspectors of mines whose mandate is to “monitor compliance and take enforcement action and perform such other functions as may be required under the Act.”⁶⁰ The Act gives the inspectors general powers of “entry and inspection to enable them enter, inspect and examine land on which prospecting or mining operations are being conducted or land which is the subject of a mineral right or enter into an area, structure, vehicle, vessel, aircraft or building that has been or is being used for or in connection with prospecting or mining operations.”⁶¹ They also have the power of “seizure, order the temporary cessation of operations where he considers that the mining or processing activities are so hazardous as to constitute a serious and imminent danger to life as well as arrest any person, with an arrest warrant and the assistance of a police officer, whom they reasonably believes

⁵⁷The Mining Act Section 181.

⁵⁸Ibid. Section 183.

⁵⁹Ibid. Section 187.

⁶⁰Ibid. Section 196.

⁶¹Ibid. Section 197.

has committed an offence under the Act.”⁶² The Act makes it a crime to obstruct or hinder mine inspection or failure to comply with the instructions given upon inspection.⁶³

The Cabinet Secretary or a public officer may institute proceedings in the Environment and Land Court (ELC) “for orders compelling a person to immediately stop activities and operations for, or connected with, the search for, prospecting, or mining of a mineral or mineral deposit in Kenya where he reasonably believes that such operations are being carried out in contravention of the provisions of the Act.”⁶⁴

The Cabinet Secretary has power to make regulations “necessary or convenient for the proper administration and implementation of the Act which include the measures to be observed to protect and rehabilitate the environment.”⁶⁵

We must note here that despite these appropriate regulations, including environmental protections being a condition for continuing mining operations following issuance of a mining permit, there is not legal provision of how these laws will be enforced when broken. Too much discretion has been vested on the Cabinet Secretary to enforce these laws without clear and precise mechanisms. Further it is saddening that environmental protection considerations are but ex-post considerations. As we shall see in the next chapter, they should be post-ante conditions precedent before allowance of FDI in the mining industry.

⁶²Ibid.

⁶³Ibid. Section 205.

⁶⁴Ibid. Section 200.

⁶⁵Ibid. Section 223.

3.6 THE COUNTY GOVERNMENTS ACT⁶⁶

The County Governments Act, 2012 was enacted to give effect to Chapter 11 of the Constitution in a bid “to provide for county governments' powers, functions and responsibilities to deliver services and for connected purposes.”

In matters of investments and environmental management, the Act states that one of its purposes is to promote, evaluate and report on compliance of the values and principles enshrined under Article 10 by the county public offices which include ensuring sustainable development.⁶⁷

County government are made up of the county assembly on one hand and the executive arm headed by the governor of the county. The county assembly has various roles among which is to approve county development planning as part of its oversight functions.⁶⁸ Another national value and principle of governance is the participation of the people and the Act gives every “person has a right to petition a county assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation” including those on development, investment and the environment.⁶⁹ “Citizen participation in county governments is based upon several principles among which there must be reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards.”⁷⁰ This is meant to reinforce the fact all power comes from the people and for any activities to be carried out, the members of the respective counties must be adequately informed and their approval sort; they must be informed of the inherent benefits

⁶⁶County Governments. Act No. 17 of 2012' (2015).

⁶⁷Ibid. Section 3 (l).

⁶⁸Ibid. Section 8 (1) (e).

⁶⁹Ibid. Section 15 (1).

⁷⁰Ibid. Section 87 (b).

and risks of the project including and environmental hazards and degradation. There is a corresponding duty placed on “county government authorities, agencies and agents have a duty to respond expeditiously to petitions and challenges from citizens.”⁷¹

3.7 THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT⁷² AND THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION (AMENDMENT) ACT, 2015.⁷³

In matters regarding the environment, conservation and environmental management, the guiding statute is the Environmental Management and Coordination Act, hereinafter referred to as EMCA. In addition, and as stated earlier, environmental laws always prevail when there is a conflict between the provisions of the law on mining and environmental management and conservation. EMCA “provides for environmental protection through; environmental impact assessment environmental audit and monitoring as well as environmental restoration orders, conservation orders, and easements.”⁷⁴

The reason this study analyses these two pieces of legislation concurrently is that the Environment Management and Co-ordination (Amendment) Act, 2015 was enacted with a purpose to amend the Environmental Management and Co-ordination Act 1999, which still remains as the principal Act. By aligning it with the constitution and to include the new structures it created particularly county governments and their role in environment and natural resource management.

⁷¹Ibid. Section 89.

⁷²The Environmental Management and Coordination Act, No. 8 of 1999.

⁷³The Environmental Management and Co-Ordination (Amendment) Act, No. 5 of 2015' (2015).

⁷⁴NEMA, 'Environmental Management and Coordination Act, 1999 (Act No. 8 of 1999): An Overview', *National Environment Management Authority*, 2016, http://www.nema.go.ke/index.php?option=com_content&view=article&id=49&Itemid=149. accessed on 16th September 2016.

As stated earlier, the Act defines the environment “to include the physical factors of the surroundings of human beings including land, water, atmosphere, sound, odour, taste, the biological factors of animals and plants and the social factors of aesthetic and includes both the natural and the built environment. Similarly, environmental management is defined to include the protection, conservation and sustainable use of the various elements or components of the environment.”⁷⁵

Section 3 (1) of EMCA provides that “every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.” This is in realization of the right granted under Article 42 which intends “to ensure that our activities do not compromise the capacity of the environment to not only meet the needs of the present generation but also those of future generations.” A person who alleges that the entitlement to a clean and healthy environment has been, is being or is likely to be contravened has a right to apply to the ELC for redress.

As stated in its preamble, the purpose of EMCA “is to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for the matters connected therewith and incidental thereto.” Due to this broad scope, this study shall be limited to those provisions that govern the management of the in the mining sector.

Under the Act, “the Cabinet Secretary responsible for the environment is mandated to perform the following functions; formulation of policies and directions for purposes of the Act; setting national goals and objectives that determine policies and priorities for the protection of the environment; promoting co-operation among public departments, local authorities, private

⁷⁵Ibid. Section 2.

sector, non-governmental organizations (NGOs) and such other organizations engaged in environmental protection programmes.”⁷⁶

In addition, the Act establishes National Environmental Management Authority (NEMA).⁷⁷ The functions of NEMA generally involve the exercise of “general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.”⁷⁸ It is the mandate of NEMA to prescribe the measures that are necessary to ensure the conservation of biological diversity in Kenya.⁷⁹

In order to carry out its mandate, NEMA is vested with the authority to administer the National Environmental Trust Fund which is to “be used to facilitate research intended to further the requirements of environmental management, capacity building, environmental awards, environmental publications, scholarships and grants.”⁸⁰

In each county, there is established a County Environment Committee which is “responsible for the proper management of the environment within the county for which it is appointed, develop a county strategic environmental action plan every five years.”⁸¹

To explain the supremacy and prevailing of environmental law provisions on any project including mining, the Act makes it mandatory for the proponents of the project “to first undertake or cause to be undertaken at their own expense an Environmental Impact Assessment (EIA) study and prepare a report thereof to be presented to NEMA.”⁸² The study and report must be conducted or prepared respectively by individual experts or a firm of experts duly by

⁷⁶Ibid. Section 5.

⁷⁷Ibid. Section 7.

⁷⁸Ibid. Section 9.

⁷⁹Ibid. Section 50.

⁸⁰Ibid. Section 24.

⁸¹The Environmental Management and Co-Ordination (Amendment) Act, No. 5 of 2015 Section 18 & Section 19.

⁸²The Environmental Management and Coordination Act, No. 8 of 1999. Section 58.

NEMA in accordance with the EMCA.⁸³ If not satisfied with the initial report submitted, NEMA “may require any proponent of a project to carry out at his own expense further evaluation or environmental impact assessment study, review or submit additional information for the purposes of ensuring that the environmental impact assessment study, review or evaluation report is as accurate and exhaustive as possible.”⁸⁴

An environmental impact assessment licence is issued where NEMA is satisfied of the adequacy of adequacy of an environmental impact assessment study, review or evaluation report.⁸⁵ However, an environmental impact assessment licence can be “revoked, suspended or cancelled; in such instances the holder thereof cannot proceed with the project which is the subject of the licence until a new licence is issued by NEMA.”⁸⁶ The proponents of the project in such instances will have to cease operations notwithstanding any approval, permit or licence granted under any other law.

NEMA is tasked with environmental audit and monitoring and to achieve this its environmental inspectors are given the power to enter into “any land or premises for the purpose of determining how far the activities carried out on that land or premises conform with the statements made in the environmental impact assessment study report issued in respect of that land or those premises.”⁸⁷ There is a corresponding duty on the “owner of the premise or operator of a project for which an environmental impact assessment study report has been made to keep accurate records and make annual reports to NEMA describing how far the project conforms in operation with the statements made in the environmental impact assessment study report submitted.”⁸⁸ The project owner must also undertake measures to mitigate and/or

⁸³Ibid.

⁸⁴Ibid. Section 62.

⁸⁵Ibid. Section 63.

⁸⁶Ibid. Section 67.

⁸⁷Ibid. Section 68 (2).

⁸⁸Ibid. Section 68 (3).

prevent adverse effects of their operation not contemplated by the EIA. In this respect, they must submit audit reports on these measures to NEMA.⁸⁹ Similarly, every owner or operator of a mining undertaking is required discharge any effluents or other pollutants originating from the mining activities only into existing sewerage systems and to do so, must acquire the necessary licence for discharge from the relevant county government agency operating or supervising such a sewerage system.⁹⁰ There is a requirement however that before the issuance of such a licence NEMA must first solicit the comments of relevant local county agencies concerned and “take into the consideration the possible effects of effluents or pollutants to be discharged on the quality of an affected water course or other source of water.”⁹¹ This licence is not absolute and is liable to revocation, cancellation or suspension at any time if the holder of the licence contravenes any provisions of the Act or any regulations made thereunder.⁹²

NEMA is required, “in consultation with the relevant lead agencies in mining, to monitor the operation of any industry, project or activity with a view of determining its immediate and long-term effects on the environment.”⁹³

The Act prohibits water pollution and “makes it an offence for any person to discharge or apply any poison, toxic or other pollutants or permits any person to dump or discharge such matter into the aquatic environment in contravention of water pollution control standards.”⁹⁴ The penalty for water pollution is “imprisonment for a term not exceeding two years or to a fine not exceeding one million shillings or to both such imprisonment and fine; in addition to this a

⁸⁹Ibid. Section 68 (4).

⁹⁰Ibid. Section 74 (1).

⁹¹Ibid.74 (4).

⁹²Ibid. Section 76 (1).

⁹³Ibid. Section 69 (1).

⁹⁴Ibid. Section 72 (1).

person found guilty and convicted of this offence may be required to pay and other incidental costs for cleaning up the polluted area and compensating any injured third parties.”⁹⁵

If mining activities result in the emission of a substance or energy which is causing or is likely to cause air pollution, the owner or operator of the enterprise is required to apply for an emission licence.⁹⁶ In granting the emissions licence, NEMA must consider the possible effects of the emissions on the quality of ambient air, find out if there are any other “existing licences affecting the same air source, give due regard to the requirements for the residents, human settlements and other industrial and commercial activities and finally solicit the opinion of the relevant county government and community likely to affected.”⁹⁷

It is invariable that during mining vehicles and other machineries have to be used, any machinery, equipment, devise or similar thing shall not be operated in a way to cause pollution and in the event that it does cause emissions into the ambient air they are not contravention of prescribed emission standards.⁹⁸

Mining in its very nature can be very noisy, the Act allows for NEMA to prescribe “minimum standards for emissions of noise and vibration pollution into the environment as are necessary to preserve and maintain public health and the environment.”⁹⁹ Any person who emits noise in excess of the emission standards established commits an offence as stated in Section 102 of the Act. It is however possible to get a temporary permit for specific heavy mining activities on such terms and conditions may be determined by NEMA.¹⁰⁰

⁹⁵Ibid. Section 72 (2).

⁹⁶Ibid. Section 80.

⁹⁷Ibid. Section 81.

⁹⁸Ibid. Section 82.

⁹⁹Ibid. Section 101.

¹⁰⁰Ibid. Section 103.

NEMA also has the mandate to establish “guidelines for measures leading to the abatement of noxious smells, whether from human activities or from naturally occurring phenomenon.”¹⁰¹

The above are the provisions that relate to maintaining of a clean and healthy environment through prohibiting or limiting all likes of pollution which are likely to occur in industrial mining.

The following are the steps which must be taken after pollution to restore the environment to what it was before the human activities involved in mining were undertaken.

An environmental restoration order is issued by NEMA to either require *inter alia* “the person on whom it has served to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order or award compensation to be paid by the person to whom it is served to other persons whose environment or livelihood has been harmed by the action which is the subject of the order.”¹⁰²

The purpose of imposing “an environmental conservation order on burdened land is to preserve; flora and fauna, the quality and flow of water in a dam, lake, river or aquifer; any outstanding geological, physiographical, ecological, archaeological, or historical features of the burdened land, the scenic view, open space, permit persons to walk in a defined path across the burdened land, preserve the natural contours and features of the burdened land, prevent or restrict the scope of any activity on the burdened land which has its object the mining and working of minerals or aggregates, prevent or restrict the scope of any agricultural activity on the burdened land, create and maintain works on burdened land so as to limit or prevent harm to the environment and finally create or maintain migration corridors for wildlife.”¹⁰³

¹⁰¹bid. Section 107.

¹⁰²bid. Section 108.

¹⁰³bid. Section 112 (4).

The order must contain “specify clearly and in a manner which may be easily understood; the activity to which it relates, the person or persons to whom it is addressed, the time at which it comes into effect, the action which must be taken to remedy the harm to the environment and the time to be taken the powers of NEMA to enter any land and undertake the action specified, the penalties for non-compliance and finally the right of the person served with an environmental restoration order to appeal against that order.”¹⁰⁴

In addition to the orders, the Act creates environmental easements whose object “is to further principles of environmental management by facilitating the conservation and enhancement of the environment, which is achieved through the imposition of one or more obligations in respect of the use of land.”¹⁰⁵

To give effect to the provisions of Section 181 of the Mining Act, EMCA provides that the “Cabinet Secretary responsible for finance may prescribe that persons engaged in activities or operating industrial plants and other are required to pay such deposit bonds as may constitute appropriate security for good environmental practice.”¹⁰⁶ The deposit bond may be refunded to the operator of the activity, industrial plant or any other undertakings on the condition that such an operator has observed good environmental practices to the satisfaction of the NEMA.¹⁰⁷

As an incentive to ensure compliance with environmental management legal provisions, the “Cabinet Secretary may, propose government tax and other fiscal incentives, disincentives or fees to induce or promote the proper management of the environment and natural resources or the prevention or abatement of environmental degradation.”¹⁰⁸

¹⁰⁴ *ibid.* Section 109.

¹⁰⁵ *ibid.* Section 112 (2).

¹⁰⁶ *ibid.* Section 28.

¹⁰⁷ *ibid.* Section 28 (3).

¹⁰⁸ *ibid.* Section 57.

3.8 CASE STUDY OF TITANIUM MINING IN KWALE KENYA

In 2014 titanium became Kenya's highest earning mineral with titanium worth Kshs. 9.4 billion being exported. Subsequently, The Government of Kenya approved the extraction of titanium in Kwale County by Tiomin Kenya Limited by issuing a mining lease in July 2004.¹⁰⁹

The said project by Tiomin Kenya Ltd was opposed by both individuals and human rights groups.¹¹⁰ The reasons for opposition cited in the claims including displacement of over 5,000 indigenous people, contamination of the soil and aquifers with heavy metals, noise pollution, loss of biodiversity owing to the interference on wildlife and agro-diversity, deforestation and loss of vegetation cover, and loss of landscape through aesthetic degradation.¹¹¹ This saw inhabitants of the area move to court instigating a lawsuit against the company in the case of *Nzioka & 2 others v Tiomin Kenya Ltd*¹¹². The applicants accused the company of not submitting an environmental impact assessment plan and not having been licensed under section 58 of the Environmental Management and Co-ordination Act (EMCA)¹¹³.

Titanium mining is also undertaken by Base Titanium Limited which is a subsidiary of the Australian firm - Base Resources which has been in existence since 2006. In 2014 Base Titanium was granted an export license and has since being exporting mineral products to overseas markets.

¹⁰⁹Leah Temper, Bene, and Martinez-Alier, 'Mapping the Frontiers and Front Lines of Global Environmental Justice: The EJAtlas'.

¹¹⁰*ibid.*

Tiomin Kenya Ltd is a subsidiary of the Canadian company Tiomin Resources Inc. which is jointly owned by a Chinese mining conglomerate Jinchuan holding a 70 per cent stake leaving the Canadian parent with 30 per cent.

¹¹¹Environmental Justice Atlas, 'Titanium Mining in the Kwale District, Kenya'.

¹¹²*Nzioka & 2 others v Tiomin Kenya Ltd*, KLR (E&L) 1 Kenya Law Reports.

¹¹³Republic of Kenya, Environmental Management and Co-ordination Act.

3.8.1 The titanium mining process

In order to understand how exactly mining negatively affects the environment, it is important taken in the mining of titanium.

The technique used for mining titanium is strip mining a process which involves clearing and stockpiling all the soil above so as to expose the mineral bearing sands.¹¹⁴ This in itself is destructive to the environment as all trees and other forms of bio diversity have to either be cut down or destroyed. The process imposes environmental problems; the open mine pits are an eye sore and destroy habitat.

3.8.1 Effect of titanium mining on the environment

The Mining Act requires that prospecting and mining activities are carried out in accordance with international best practice. However, this is not adhered to, the rules are greatly flaunted and there are no reparations on the part of the offenders. Kenya is seen to have sold out its minerals and clean environment all in the interest of development. Below are a few instances of how poorly environmental management is effected in titanium mining.

When Tiomin Kenya was granted rights to prospect and mine titanium in Kwale, there was a requirement for there to be environmental impact assessment as required by Section 58 of EMCA. From the onset, however, there were concerns on the credibility of the pledges to rehabilitate mined land made by a firm that was undertaking its first mining project.¹¹⁵

The dangers of this project were highlighted by various distinguished scholars even before the project commenced. The authenticity of the environmental impact assessment study was

¹¹⁴Elphas Victor Ojiambo, 'Battling for Corporate Accountability: Experiences from Titanium Mining Campaign in Kwale, Kenya' (Seminar on Linking Rights and Participation: Sharing Experiences and Opportunities 29th May 2002, Institute of Development Studies, University of Sussex: IDS Participation Group, 2002).

¹¹⁵Ibid.

questioned by many due to the fact that it was commissioned by the proponents of the project themselves therefore giving rise to suspicions that the negative effects of the project may have been downplayed or outrightly ignored.

In order to carry out mining, Tiomin had to compensate and resettle the persons on whose land there were titanium mineral deposits. There however was opposition from the way the firm was going about with the acquisition of property. Tiomin took up the approach of only compensating the land owners with title deeds and deemed those which out as land squatters and therefore not entitled to any compensation. Those who owned land under customary law did not have title deeds were forcefully evicted by the government without any compensation whatsoever.

There was a clear violation of Section 58 of EMCA when carrying out of the EIA report in that Tiomin chose to have it carried out by a South African consulting firm. There is a requirement that the study and report must be conducted or prepared respectively by individual experts or a firm of experts duly authorized to perform such duties by NEMA. It is this that informed the High Court to issue injunction in *Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited*¹¹⁶ on the basis of violation of the provision of Section 58 of EMCA.

Most of the negative effects to the environment as a result of titanium mining are compounded by the fact that the locals who live around the mining site are not aware of their constitutional right to a clean and healthy environment as contained in Article 42.¹¹⁷

The main negative effects to the environment as a result of titanium mining are; water pollution, noise and vibration from the equipment used in mining and drilling of the strips, air pollution

¹¹⁶[2001] eKLR.

¹¹⁷Kayumba Angelani Ange, 'Challenges and Prospects of Equitable Benefit Sharing in Mining Sector: A Case Study of Titanium Mining in Kwale County, Kenya' (University of Nairobi, 2014).

and a health issue concerns from the potential radioactive rocks that are exposed after mining as well as breathing and eye complications from the dust.

The problem in the poor state in environmental management lies in the way the law is written. The law lays emphasis on environmental rehabilitation and restoration which will happen after mining is complete. Given the fact that titanium mining is still ongoing, the locals have to suffer with poor quality of water, air among other health complications as a result of pollution.

There is no evidence of any official being prosecuted for any sort of pollution and in any event, the law allows for firms to get a temporary permit for specific heavy mining activities on such terms and conditions may be determined by NEMA.¹¹⁸ These exceptions only act to adding on to environmental pollution and degradation.

It is important to note that the lack of any follow up by NEMA or successful prosecution of anyone who undertakes polluting is highly attributable to the low budgetary allocations to NEMA render it incapable of fully carrying out its monitoring and prosecutorial mandate.¹¹⁹ Its work is largely confined to licencing and other roles that come before the commencement of any project. This lack of resources faced by NEMA inevitably leads to the rise of situations where projects with possibly huge impacts on the environment are not adequately policed and the implementation of environmental management regulation is not monitored as required; to cure these inadequacies it is to the proponent of a project who are trusted to do the right thing with little oversight from NEMA.¹²⁰

In titanium mining, Tiomin, now Base Titanium, have not disclosed the chemical composition of the minerals they are mining making it difficult to know the extent to which its actions are

¹¹⁸ See Section 103 of EMCA 1999.

¹¹⁹ Benjamin Barczewski, 'How Well Do Environmental Regulations Work in Kenya? : A Case Study of the Thika Highway Improvement Project' (Nairobi: The Center for Sustainable Urban Development and the University of Nairobi, June 2013).

¹²⁰ *ibid.*

likely to negatively affect the environment.¹²¹ The measures laid out on how to avoid damage to the environment as a result of the operations of the minerals processing plant in Kwale are inadequate and superficial.¹²²

One of the greatest concerns to this mining undertaking is the risk of pollution as a result of accidental spillage or breakage could end up in the ocean which inevitably would significantly impact on marine life and residents living near the mining site.¹²³

Presently, the residents living around the mining site are experiencing a shortage of clean and drinkable water as a result of the large quantities of water being diverted to the mineral processing plant.¹²⁴ This is in clear violation of the constitution which makes clean and safe water an integral aspect of a clean environment an economic and social right.¹²⁵

The importance of conducting an EIA cannot be gainsaid. Indeed, this was perhaps captured by the High Court in the *Rodgers Muema Nzioka case* when it posited thus:

“The current situation in regard to the Kwale mining project highlights the need for countries to conduct credible EIAs that are participatory and independent. In the Kwale case, the EIA carried out by the CES-led consortium was not independent, as it was carried out by the same consulting firm that developed the terms of reference, and two volumes of the EIA were prepared by Tiomin staff. Tiomin employees managed the public participation process in a way that interpreted ‘participation’ to mean ‘consultation’. Their reports did not mention any of the decisions that were arrived at or explain what had changed as a result of the public participation process. Of

¹²¹J.O.Z. Abuodha and P.O. Hayombe, ‘Protracted Environmental Issues on a Proposed Titanium Minerals Development in Kenya’s South Coast’, *Marine Georesources & Geotechnology Journal* Volume 24, no. Issue 2 (2006): Pages 63–75.

¹²²*ibid.*

¹²³*ibid.*

¹²⁴*ibid.*

¹²⁵*Constitution of Kenya*. Article 43 (1) (d).

particular importance is the need to evaluate a no-go scenario, an aspect that was not captured by the Kwale EIA.”

In this sense, the EIA process is an important economic development tool that helps people to understand environmental issues

3.9 CONCLUSION

In as much as Kenya through its government agencies and citizens must strive for economic growth and maximize all its minerals and natural resources, emphasis is laid on the fact that all this is done in a sustainable manner with a look of ensuring that the present generations conserve the environment and protect it for future generations.

The adverse effects suffered by the environment, as results of the titanium mining operations in Kwale are largely documented with emphasise being given to the benefits that arise from the mining operations. The persons suffering these negative effects suffer in silence due to the lack of awareness of their legal rights and the ways though which they can demand environmental conservation. This is also compounded by the inadequacies faced by NEMA in forcing compliance on the part of Base Titanium Limited and will depend on its willingness to adhere to the set out environmental regulations. There is then an urgent need to streamline Kenya’s law in order that Kenya can ensure it achieves sustainable development but at the same time ensure this is not done at the expense of environmental protection.

CHAPTER FOUR: CRITICAL ANALYSIS OF SOUTH AFRICA'S LEGAL FRAMEWORK ON FDI AND ITS IMPACT ON ENVIRONMENTAL PROTECTION IN SOUTH AFRICA'S MINING INDUSTRY

4.1 INTRODUCTION

It has been demonstrated in the preceding chapters that FDI generates immense benefits for developing countries especially in the mining sector. Through FDI, countries like South Africa and Kenya which lack expertise and resources to exploit its rich mineral reserves, often depend on FDI. It has also been demonstrated that the inadequacy of management and enforcement of environmental laws in the mining sector may also lead to profound risks for the environment. Indeed, inadequate regulation of the mining sector and unchecked FDI in that sector may lead to unsustainable utility of resources.¹

FDI may revitalize growth and promote structural efficiencies, encourage new investments in environmentally friendly technology in production and exploitation of minerals.² Recently practice is that most companies have environmental departments. Mining exploration companies have not been left behind in this endeavor. This would mean that environmental protection policies have become a fundamental consideration for most mining companies.³ The question that now begs is, why is it that in spite of these companies having set up environmental departments, their operations still lead to negative effects on the environment? In the immediate

¹Wilhelms S.K., "Foreign Direct Investment and its Determinants in emerging economies," African Economic Policy Paper, Discussion Paper Number 9 (1998).

²Colin NoyBoocock, "Environmental Impacts of Foreign Direct Investment in the Mining Sector in Sub-Saharan Africa," at 22 in OECD, Foreign Direct Investment and the Environment: Lessons from the Mining Sector (2002)

³Monika Weber-Fahr, Craig Andrews, Leo Maraboli and John Strongman, "An Asset for Competitiveness: Sound Environmental Management in Mining Countries," in OECD, Foreign Direct Investment and the Environment: Lessons from the Mining Sector (2002), at 105

chapter we demonstrated that, the problem lies in host countries' lack of will and resolve in enforcing their domestic legal regulations.⁴

Further it is noteworthy that the cost of protecting the environment adds to the cost of production for most mining companies. Perhaps then, having taken this into consideration and being aware of the important expertise, resources and services they offer to their host countries, companies do everything in their power to obtain concessions from the respective governments to relax the strict enforcement of environmental protection laws.

It is noted that in some jurisdictions, certain developing countries in their bid to attract FDI, lower their environmental standards. They do so either intentionally or in other cases, there is resistance in providing for more stringent standards. In most cases, they outright fail to provide for adequate enforcement mechanisms of regulating FDI.⁵ Indeed as seen, Kenya seems to fall in this latter category. While Kenya has enacted laws towards regulation of FDI and mining activities generally, there is little to no goodwill in enforcing these policies to ensure that environmental considerations are a core condition for allowing FDI in the Kenyan mining industry.⁶

This then necessitates a need to find a viable way in which countries allowing FDI in their mining sectors can control and regulate the sector to manage the environmental impact of those operations. In this respect, it is necessary to look at how other countries have approached and indeed managed to succeed where Kenya is lacking. It is for this reason that this chapter

⁴ Criticism was placed on Kenya for having failed to actualize the numerous laws enacted to regulate the mining industry to ensure that the mining operations of foreign companies do not lead to adverse effects on the environment and where the environment has been harmed, these companies must restore and rehabilitate the environment. See *infra* Chapter 3.

⁵ Monika Weber-Fahr, Craig Andrews, Leo Maraboli and John Strongman, "An Asset for Competitiveness: Sound Environmental Management in Mining Countries (n 4).

⁶ *Supra* Chapter 3.

undertakes to offer an analysis of the legal and policy framework for environmental management of FDI in South Africa's mining industry.

4.2 FDI IN SOUTH AFRICA

South Africa is an attractive destination for investors as it has provided for and set up mechanisms to encourage FDI. Not only is it a growing market with significant potential for growth, it has strategically developed strong capital markets, financial institutions, adequate transport and communication infrastructure as well as maintained consistent supply of cheap labour. It is also home to a vast reserve of raw material. Additionally, the foreign investors are allowed 100 per cent shareholding in their local private entities. They are also allowed a free hand in the repatriation of profits. This coupled with South African government policy of providing tax and investment incentives make opportunities for foreign investment greater.⁷ However, in this overriding objective to promote FDI, South Africa has also provided monitoring mechanism to regulate the operations foreign investors.

South Africa's primary legal framework on FDI is the Protection of Investment Act (PIA).⁸ The PIA was enacted to implement numerous bilateral investment treaties (BIT) entered into by the South African government and foreign investors since.⁹ Under the PIA both South African citizen and foreign investors are treated equally with respect to investments.¹⁰

One of the most outstanding principles of the PIA are public interest and welfare goals. In this regard, under section 12 of the PIA, reserves the rights of the South African government to regulate FDI to ensure the fulfilment of the State's obligations in providing financial stability.¹¹

⁷OECD-South Africa investment policy dialogue: Self-assessment of South Africa's investment regime in relation to the OECD Codes of Liberalisation and the principle of National Treatment (2014), at 15.

⁸ Act No. 22 of 2015, Laws of South Africa.

⁹South Africa has a total of 45 BITs.

¹⁰ Section 8 PIA.

¹¹ See section 12 of the PIA

FDI-related policies are implemented in specific sectors and specific regulatory measures are in place directed at mitigating any risks that foreign investors may face as well as providing checks to foreign companies investing in South Africa.¹²

In the mining sector, FDI is only promoted in so far as the expropriation operations are undertaken on the basis of public interest and the communities in the vicinity of expropriation have the right to be compensated for any damages caused by such activities.¹³

4.3 SOUTH AFRICA LEGAL AND POLICY FRAMEWORK IN THE MINING SECTOR

Mining is an important component of South Africa's economy as South Africa richly endowed with minerals.¹⁴ With this also arouse the need to regulate FDI in South Africa and even so in the mining industry to ensure that environmental consideration be at the fore-front before permitting foreign companies from undertaking any mining activities.

4.3.1 Environmental Laws

Since the mid-1990s, South Africa has enacted numerous environmental legislations which mostly focus on the protection and sustainable management of natural resources and the environment. A balance has been struck between environmental protection and the encouragement of foreign investment. Thus, it is imperative for all explorations operations to be subjected to environmental impact assessment.

¹² These statutes include but not limited to; Close Corporations Act No. 69 of 1984, Companies Act No. 71 of 2008, Competition Act, Act No. 71 of 1998, Employment Equity Act (EEA) No. 55 of 1998, Labour Relations Act No. 66 of 1995, Occupational Health and Safety Act No. 1993, Basic Conditions of Employment Act No. 75 of 1997, Skills Development Act No. 97 of 1998, Skills Development Levy Act No. 9 of 1999,

¹³ South Africa Constitution of 1996, Article 25 (2) and (3).

¹⁴Colin NoyBoocock, "Environmental Impacts of Foreign Direct Investment in the Mining Sector in Sub-Saharan Africa," (n 3), at 22.

The South African Constitution, 1996 under sections 24 provides that “everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that: prevent pollution and ecological degradation, promote conservation, and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.” This section is enforced as of right through section 38 which provides for mechanisms of instituting proceedings before the constitutional court if the rights enshrined under section 24 are infringed or threatened.

These provisions provide the foundation for the development of an adequate environmental policy as well as ensure the implementation of South Africa’s national strategies and principles of sustainable development.¹⁵

The environmental law in South Africa is sourced from a number of Acts of which the main statute is the National Environmental Management Act (NEMA). Under NEMA principles of environmental decision making as well as the outline of institutional environmental framework are set out in what is referred to as the co-operative framework of environmental governance. NEMA further provides for the enforcement mechanisms as well as the incorporation of international environmental in South African environmental policy. This Act also mandates the enforcement of the “polluter pays principle.”¹⁶

More importantly, NEMA promulgates regulation on environmental impact assessments (EIA) and licensing of operations.¹⁷ The purpose of these Regulations is “to regulate the procedure and criteria of integrated environmental management relating to the submission, processing

¹⁵OECD-South Africa investment policy dialogue (n 8).

¹⁶ Section 28 of National Environmental Management Act. The polluter pays principle is an environmental policy principle which requires that the costs of pollution be borne by those who cause it. The Principle is a generally recognized principle of International Environmental Law.

¹⁷ The 2006 regulations were updated and replaced on 2 August 2010.

and consideration of, and decision on, applications for environmental authorizations for the commencement of activities in order to avoid detrimental impacts on the environment, or where it cannot be avoided, ensure mitigation and management of impacts to acceptable levels, and to optimize positive environmental impacts.”¹⁸

4.3.2 Mining Laws

Mining is also regulated by several laws but the most important are the Minerals Act,¹⁹ the Mine Health and Safety Act²⁰ and the Minerals and Petroleum Resources Development Act.²¹

Under the Minerals Act, all mineral explorers must have an environmental management plan (EMP) approved by the Department of Minerals and Energy. The rationale for this is so as to ensure all exploration companies comply and implement the cradle-to-grave approach to environmental management. To this end, each of these companies are obliged to develop an environmental management programme. This report must include the description of the pre-mining environment, an outline of the project and its objectives, the environmental impact assessment and indication of management of the impacts.

The EMP must also outline financial commitment for regular environmental monitoring, audits and rehabilitation programmes.²² Financial guarantees be in the form of bank guarantees or through dedicated environmental trust funds. In this endeavor, the aim is to apply uniform environmental management standards across all mining operations including artisanal mining. Once approved, the EMP is legally binding and the provisions therein peremptory. Non-

¹⁸ National Environmental Management Act, Section 23 and 24.

¹⁹ Act No. 50 of 1991, Laws of South Africa.

²⁰ Act No. 29 of 1996, Laws of South Africa.

²¹ Act No. 28 of 2002, Laws of South Africa.

²² Government of South Africa Gazette, 20 October 1998.

compliance may be sanctioned by withdrawal or suspension of the mining licence or criminal prosecution of the licence holder.²³

The Minerals Act requires rehabilitation of the land surface after mining. Thus, a certificate of closure certificate is only be given post termination of mining activities once an audit of the implementation of the EMP has been carried out and the authorities are satisfied with rehabilitation programmes undertaken.²⁴

Mines in South African are further subject of regular inspection and inspectors are vested with authority and power to suspend operations where necessary. The government of South Africa often refuses licences to mine if it is considered that the environmental risk of undertaking the project outweighs its economic benefit. This resolve was demonstrated when the government of South Africa refused to license Richards Bay Minerals (RBM), an affiliate of the Rio Tinto Group, to undertake mining operations near St. Lucia Estuary, a wet land of international repute.²⁵

4.3.3 Law in action: Palabora Copper Mines

In 1998 the South African government authorized Palabora Mining Company Limited producer of refined copper to be its primary producer of South Africa's refined copper. Palabora Mining Company Limited is a wholly owned subsidiary of the UK-based Rio Tinto Group. The company owes its origin to the unique formation known as the Palabora Igneous Complex where the company operates large block cave copper mines.²⁶

Since 1998, Palabora Mining Company Limited has had its EMP not only approved by the Department of Minerals and Energy but also ISO 14001 certified. It was also a condition for

²³Department of Minerals and Energy, 2000.

²⁴Colin NoyBoocock, "Environmental Impacts of Foreign Direct Investment in the Mining Sector in Sub-Saharan Africa," (n 3), at 23.

²⁵ Ibid.

²⁶<http://www.palabora.com/palabora.asp> accessed on 15th February 2017.

the permit for Palabora Mining Company Limited to develop a Safety, Health Environment and Quality management system with the aim that all its employees are aware and subscribe to the company's environmental goals.

The Palabora Igneous Complex is adjacent to a major game park, and as such is closely scrutinized by the government, the National Parks Board and the local community. Thus, the company must file with the relevant authorities monthly internal audits. Government procured independent audits is also conducted on a bi-annual basis.²⁷

Before Palabora Mining Company Limited obtained its water permit from the Department of Water Affairs and Forestry, it was obligated by the department to construct a water processing plant operated on a closed water circuit, with maximum use made of recycled water where practicable. Shallow seepage from tailings is recovered in a seepage cut-off trench and returned to the processing circuit as a result deeper recovery system has been installed. The Department Water Affairs and Forestry also on a regular basis constantly monitors the operations of the company to ascertain the quality of the groundwater.²⁸

The nature of inspection and monitoring by the government and relevant authorities ensure that “rehabilitation occurs in parallel with operation of the mine, with the aim of returning the land to a condition as close as possible to that existing prior to mining. Revegetation of waste rock and tailings dumps with indigenous plants is undertaken, with the objective of establishing a self-sustaining system.”²⁹ Indeed, in 1999 when the mines had an open pit, some 700m deep, the Department of Minerals and Energy obliged Palabora Mining Company Limited to formulate “a detailed mine closure plan in consultation with the local community and a decommissioning fund was established this is despite the fact that the closure and rehabilitation

²⁷Colin NoyBoocock, “Environmental Impacts of Foreign Direct Investment in the Mining Sector in Sub-Saharan Africa,” (n 3), at 24.

²⁸ Ibid.

²⁹ Ibid.

cost provisions were about 8.6% of the year's profits after financial costs and taxation."³⁰ This was in conformity with the long-standing rule in South Africa that "rehabilitation cost provisions are the net present value of the estimated cost of restoring environmental disturbance that had occurred up to the balance sheet date of the mining company."³¹

In compliance with section 12 of the PIA in achieving its welfare goal commitments, "Palabora Mining Company Limited has created the Palabora Fund, which receives 3% of net annual profits in order to implement community projects within a 50km radius of the mine. These projects seek to improve education standards, technical training and job creation."³²

4.4 CONCLUSION

It is evident that from the foregoing exposition on South Africa, they not only have put in place robust laws to not only regulate and promote FDI but they have deliberately provided as a mandatory objective, the protection of the environment to ensure sustainable investments in the mining sector.

FDI in South Africa is mostly in its mining sector and thus it is laudable that environmental considerations are primary conditions before foreign companies are allowed to establish their operations. South Africa thus in this sense cannot be considered a lower environmental standards country. Not only are there existing laws, but there is a strong and effective enforcement mechanism in place to ensure compliance.

³⁰ Ibid.

³¹ Ibid.

³² <http://www.palabora.com/palabora.asp> accessed on 15th February 2017.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

In order to handle the issues raised by this study, it was necessary to break them down in many smaller units. These units are all interconnected; they are all facets of a single problem. This chapter aims to bring together the ideas, arguments and suggestions in the preceding chapters in a unified but coherent pattern and put forward cogent recommendations with the view of how Kenyan legal framework for environmental management of FDI in the mining industry should be changed to provide adequate environmental safeguard provisions and effective enforcement and implementation mechanism of those provisions.

5.2 SUMMARY OF STUDY

The core focus of this study was to analyze Kenyan law on FDI in the mining industry in a bid to find out whether these laws have struck the proper balance between promoting FDI while at the same time ensuring environmental management and conservation.

The thesis began with providing a background on the importance of FDI in Kenya and particularly in the mining industry. The study was keen to highlight that FDI in the mining sector is particularly important due to the fact that foreign companies are required to assist Kenya exploit its vast minerals by providing the necessary required expertise, equipment and manpower that is lacking in Kenya and would be difficult and expensive to generate even through domestic saving and investment. The study recognized the government of Kenya has often given them a free pass by providing companies in the mining sector with many concessions and only regulating them to the extent of ensuring that at the inception they possess the necessary expertise and resources to carry out explorations. Beyond that and after they are granted mining permits, the activities of these companies are not monitored to ensure they

abide by existing laws that safeguard the environment in the few instances where these considerations are provided for under Kenyan law.

Having recognized this problem, chapter two of this study was keen on outlining the relationship of the concepts of FDI, environmental management and sustainable development to show that FDI and environmental management may be employed together to achieve sustainable development of the mining industry in Kenya. The study noted in this chapter that whereas the mining industry was “vital for economic development of developing countries, mining operations have often resulted in severe social and environmental disruption, particularly in the adjoining communities.”³³ There is thus a paramount need to regulate activities within this sector to ensure players also make consideration for proper environmental management. Particularly it was noted here that even with FDI, the Kenyan government should not relax regulations on environmental protection consideration. Further it was outlined that the government was not keen exercising strict management and monitoring of activities that threaten environmental degradation but was focusing mainly on marketing itself as an investment destination and the strict implementation of environmental laws would only serve to slow down investments.

Chapter three of this study focussed on examining the legal framework for FDIs and environmental management in Kenya and how these complement each other. It was noted that these environmental management laws for FDI in the mining sector lack in the sense of inadequate enforcement mechanism to ensure compliance. This was demonstrated by how these laws were implemented in allowing a foreign company to undertake mining activities in Kwale region. It was shown here the extent to which this company gave zero consideration to the environmental impact of their activities and the inaction by government to monitor and

³³ Supra Chapter 2.

supervise the activities of this company and reprimand the company for their omission. As a result, the study stressed that there was urgent need to streamline Kenya's law in order to ensure that Kenya achieves sustainable development by promoting and encouraging FDI but at the same time ensuring that this is not done at the expense of environmental protection.

Chapter four of this study offered an analysis South African legal and policy framework in South Africa relating to FDI in their mining industry. It was demonstrated here that in South Africa, environmental protection consideration was a key pillar in determining whether or not FDI would be authorised in mining projects. Particular focus was given as to how South African law was implemented in the exploration activities of the Palabora copper mines. It was noted here that in South Africa there are existing proper and effective laws to regulate activities of foreign companies engaging in exploration of South African minerals but also there was a strong and efficient enforcement mechanism in place to ensure compliance with these laws. In this respect, it was suggested that Kenya would do well by borrowing from South Africa and effectively adjusting its laws to likewise provide for proper, adequate and effective regulation of FDI in its mining industry.

5.3 FINDING

After evaluation of all facts and evidence provided, this study makes a conclusion that Kenya's legal and policy framework for environmental management of FDI in the mining industry is robust on paper but lacking in adequate and effective implementation of the laws and regulations in place for sustainable use of the environment. In the instances where environmental considerations have been provided for, there is a lack of proper and effective implementation and enforcement mechanisms to realize those provisions.

The Investment Promotion Act provides for legal mechanisms for the promotion and fostering of FDI. It particularly lays down means and ways in which the Kenya Investment Authority may promote Kenya and attract prospective foreign investors. The Authority assists foreign investors by issuing investment certificates having satisfactorily demonstrated to the Authority that they have the capacity to invest the minimum amount of one hundred thousand dollars and that the activity they are investing in is lawful and beneficial in Kenya. Once this is satisfied the Authority assists foreign investors by facilitating them in obtaining the necessary licenses and permits as well as assisting them in obtaining incentives or tax exemption and providing information on investment opportunities or sources of capital.³⁴

The Foreign Investment Protection Act on the other hand is geared to ensure that the law adequately provides for the protection of foreign investments for foreign investors already established in Kenya. This is also a way of promoting Kenya as an attractive destination for more foreign investments.

Under the mining Act, FDI in this sector is regulated to the extent of making it mandatory for foreign companies who want to engage in exploration in Kenya to first seek mining permits and / or licences.³⁵ It is noteworthy that before mining rights are granted, the applying company or person must first meet certain conditions that take into account; “the protection of the mineral interests, the protection of the environment, community development, safety of prospecting and mining operations, health and safety of persons undertaking those operations, the protection of the lawful interests of the holders of any other right and the maximum number of blocks a person or a company may hold.” However, the Act is silent on how these the conditions may be monitored to ensure that they have been met. Further, the wording of the Act is to the extent that these requirements may only be satisfied at the application stage for

³⁴ See the Investment Promotion Act, Chapter 485B, laws of Kenya at section 15.

³⁵ Mining Act, No. 12 of 2016 at section 10.

there is no monitoring or supervision mechanism put in place post the issuance of the mining rights. The only provision that can be interpreted as being a post-enforcement mechanism is the Environmental Protection Bonds³⁶ which are payable by an applicant for a licence, if so required as security sufficient to cover the costs associated with the implementation of the environmental and rehabilitation obligations.³⁷ This is payable at the application stage. There is however no criteria set out for determining if and when this bond may be payable.

One would think that in matters environmental protection, EMCA would apply by mandating NEMA to exercise “its general supervision and co-ordination over all matters relating to the environment.” However, its mandate is only restricted to evaluating the adequacy of any environmental impact assessment undertaken.

The implementation of these laws was clearly seen to be inadequate in the case study of the mining of titanium in Kwale county. It was noted in the case of *Nzioka & 2 others v Tiomin Kenya Ltd*³⁸ that despite the fact that Tiomin Kenya Ltd did not undertake any environmental impact assessment and was not even licensed under section 58 of the EMCA but was still issued with mining rights. It only took the intervention of the court to issue an injunction to stop the mining activities.

When Kenya’s position is juxtaposed with the position prevailing in South Africa, the Kenyan position seems bleaker. South Africa does not only have robust laws regulating FDI and mining but they also possess effective enforcements mechanisms that ensure that these laws are implemented. Under the South African Protection of Investment Act, “the South African government or any other relevant state organ in regulating FDI may apply measures which may include redressing historical, social and economic inequalities and injustices; promoting and

³⁶ The Environmental Protection Bonds are in a form and for an amount as may be determined by the Cabinet Secretary having regard to the particular characteristics of the project.

³⁷The Mining Act Section 181.

³⁸ [2001] eKLR.

preserving cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage; fostering economic development, industrialization and beneficiation; achieving the progressive realization of socio-economic rights; or protecting the environment and the conservation and sustainable use of natural resources.”

Further, FDI related policies are pursued in specific sectors, and specific regulatory measures are in place directed towards mitigating any risks that foreign investors may face as well as providing checks to foreign companies investing in South Africa.³⁹

Further under South African National Environmental Management Act, environmental impact assessment is a mandatory requirement before any licences are issued to any entity that undertakes any activities that affect the environment.

The South African Minerals Act provides that all operating mines must have an environmental management plan (EMP) approved by the Department of Minerals and Energy. The aim is to ensure a cradle-to-grave approach to environmental management. To assist companies in complying with this requirement an Environmental Management Programme Report has to be developed. The report requirements include a description of the pre-mining environment, the motivation for and a description of the project, an environmental impact assessment and an indication of how the impacts will be managed. The EMP requires adequate financial guarantees for mine rehabilitation and arrangements for monitoring and auditing.⁴⁰ It is noteworthy that once approved by the government, the EMP becomes legally binding. Non-

³⁹ These statutes include but not limited to; Companies Act No. 71 of 2008, Close Corporations Act No. 69 of 1984, Competition Act, Act No. 71 of 1998, Labour Relations Act No. 66 of 1995, Employment Equity Act (EEA) No. 55 of 1998, Basic Conditions of Employment Act No. 75 of 1997, Occupational Health and Safety Act No. 1993, Skills Development Act No. 97 of 1998, Skills Development Levy Act No. 9 of 1999.

⁴⁰Government of South Africa Gazette, 20 October 1998.

compliance may be sanctioned by suspension or withdrawal of a mining licence, or prosecution of the licence holder.⁴¹

The South African government's concern about environmental protection is illustrated further by the fact that mines in South Africa are subject to regular inspection and inspectors have the power to suspend operations if necessary. In addition, the South African government often refuses authorization to mine if it considers that potential environmental risks outweigh the economic benefits of a project.⁴² Indeed this was appropriately identified in the implementation of these South African laws in the Palabora Copper Mines as was highlighted in chapter four above.

5.4 RECOMMENDATIONS

As noted in the findings above, Kenyan law on regulating FDI in the mining sector is wanting. This as was recognised in chapter four of this study which exposes Kenya as falling short of implementing the laws already in place and hence coming off as having lower environmental standards. Kenya must thus strike a balance between promoting FDI especially in the mining sector to enable it to explore her minerals but in doing so to also ensure that the same is done in a sustainable manner that fosters environmental protection.

To cure this deficiency, this study recommends that it is pertinent that the following should be considered:

(a) Adoption of provisions recognizing environmental safeguards in Kenya's legal and policy framework on FDI in the mining sector

⁴¹Department of Minerals and Energy, 2000.

⁴² See infra chapter 4: An example of this was the decision not to allow heavy mineral sands mining by Richards Bay Minerals (RBM), an affiliate of the Rio Tinto Group, near the St. Lucia Estuary, the largest estuarine system in South Africa which has been recognized as a wetland of international importance.

Legal and policy framework of FDI in the mining industry must incorporate environmental consideration as a primary key condition before the issuance of mining rights to any company. This particular provision should not just be a requirement for issuance of mining rights but should also be a condition for the entire duration of the mining activities. Among other things, these provisions must incorporate polluter pays principle as well as adequate and effective rehabilitation of the environment principle post exploration. It is important that this is provided in the Kenyan FDI policy because the extractives industry in Kenya is predominately a sector where FDI is the driving force.

Section 181 of the Mining act should also be amended to provide for a definite way of establishing when and how the Environmental Protection Bonds are payable. This study recommends that it should be based on the environmental impact assessment. This is because the environmental impact assessment is the best forecast of the foreseeable impact the mining activities of the company will have on the environment and thus the bond should be security able to cover this foreseeable impact.

(b) Adoption of appropriate mechanisms for the implementation of environmental safeguards

Just like in South Africa, Kenya must develop a robust implementation of programmes to the realization of environmental safeguards in its laws and policies. To this end there should be the establishment of a body that supervises and monitors the activities of foreign companies specifically in the mining industry to ensure they comply with laws set up to regulate their exploration activities. Inspectors should have the power to suspend operations if necessary when these companies engage in activities that are detrimental to the environment to the extent that outweighs the benefit accruing.

It should be emphasized that as an enforcement principle, the implementation of environmental considerations should not be placed on the back banner just so as to encourage foreign investment in Kenya. In fact, as is provided in South Africa, the Kenyan authorities should be empowered to deny investors authorization of mining projects if the potential environmental risks outweigh the economic benefits of a project.

In light of the foregoing, it is worth celebrating that Kenya has in recent times demonstrated her commitment towards the realization of the SDGs and more specifically towards sustainable use of the environment in the recently concluded *Cortec Mining vs Republic of Kenya*⁴³ when Kenya successfully defended revoking an irregularly acquired mining citing that, ***“...as a matter of statute law, a number of key approvals and consents were required and conditions were to be satisfied before they could be allowed to obtain a valid mining licence, including requirements arising out of the special protected status of Mrima Hill as a forest reserve, nature reserve and national monument. The claimants were also required to produce a mining feasibility and an approved EIA licence, which they never did.”*** The Cortec Mining vs Republic of Kenya case⁴⁴ is indeed a glimmer of hope, a step in the right direction in light of this study and a win for the people of Kenya at large. With more cases like this across the board, Kenya will inevitably join the ranks of sustainably developed countries in due course.

⁴³ Cortec Mining Kenya Limited, Cortec (Pvt) Limited and Stirling Capital Limited vs Republic of Kenya, ICSID Case No. ARB/15/29 <https://arbitration.org/award/627>

⁴⁴ Ibid.

BIBLIOGRAPHY

Books

Barrow C., *Environmental Management for Sustainable Development*, 2nd Edition (Routledge Taylor & Francis Group, 2006).

Dunning J., *Multinational Enterprises and the Global Economy* (Harlow, Essex: Addison Wesley Publishing Company, 1993).

Hague P., 'An Introduction to Research Methodologies', in *A Practical Guide to Market Research* (Stockport, United Kingdom: Grosvenor House Publishing Ltd, 2006).

Mabey N. and McNally R., 'Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development' (WWF-UK, August 1999).

Pazienza P., *The Relationship Between FDI and the Natural Environment*, SpringerBriefs in Economics (Springer International Publishing, 2014).

Articles

Abala D., 'Foreign Direct Investment and Economic Growth: An Empirical Analysis Of Kenyan Data', *DBA Africa Management Review* 4, no. 1 (April 2014).

Abuodha J.O.Z.and Hayombe P.O., 'Protracted Environmental Issues on a Proposed Titanium Minerals Development in Kenya's South Coast', *Marine Georesources & Geotechnology Journal* Volume 24, no. Issue 2 (2006).

Boocock C., 'Environmental Impacts of Foreign Direct Investment in the Mining Sector in Sub-Saharan Africa', in *Conference on Foreign Direct Investment and the Environment*

Lessons to Be Learned from the Mining Sector (OECD Global Forum on International Investment, OECD Headquarters, Paris, France, 2002).

Chiziane E., et al., 'Legal Frameworks Enabling Sustainable Land-Use Investment in Mozambique: Current Strengths and Opportunities for Improvement', Working Paper, CIFOR Working Papers (Bogor, Indonesia: Center for International Forestry Research (CIFOR), 2015).

Everett T., et al., 'Economic Growth and the Environment', Defra Evidence and Analysis Series (Department for Environment Food and Rural Affairs (UK), March 2010).

Gelb S., *Foreign Companies in South Africa: entry, performance and impact*. Johannesburg: Edge Institute, 2002.

Hitam M. and Borhan H., 'FDI, Growth and the Environment: Impact on Quality of Life in Malaysia' (ASEAN Conference on Environment-Behavior Studies, Bangkok, Thailand: Elsevier Limited, 2012).

James P. Walsh and Jiangyan Yu, 'Determinants of Foreign Direct Investment: A Sectoral and Institutional Approach', IMF Working Paper (International Monetary Fund, July 2010).

Johnston D., "Foreign Direct Investment and the Environment: Challenges and Opportunities", *Foreign Direct Investment and the Environment*, OECD (1999).

Levin Institute- The State University of New York, 'Factors Influencing Foreign Investment Decisions', *Globalization 101*, 2016.

Mohammed M., Wasseja and Mwenda S., 'Analysis of the Determinants of Foreign Direct Investment in Kenya', *Journal of Multidisciplinary Scientific Research* 3, no. 4 (2015).

Mottaleb K. and Kalirajan K, 'Determinants of Foreign Direct Investment in Developing Countries: A Comparative Analysis' (Crawford School of Economics and Government, 2010).

NoyBoocock C., "Environmental Impacts of Foreign Direct Investment in the Mining Sector in Sub-Saharan Africa," at 22 in OECD, *Foreign Direct Investment and the Environment: Lessons from the Mining Sector* (2002).

Ojiambo E., 'Battling for Corporate Accountability: Experiences from Titanium Mining Campaign in Kwale, Kenya' (Seminar on Linking Rights and Participation: Sharing Experiences and Opportunities 29th May 2002, Institute of Development Studies, University of Sussex: IDS Participation Group, 2002).

Olson, M., "The rise and decline of nations: Economic growth, stagflation, and social rigidities. Yale University Press (2008).

Pigato M., 'The Foreign Direct Investment Environment in Africa', Working Paper, Africa Region Working Paper Series, (April 2001).

Robert E. Lipsey, 'Foreign Direct Investment and the Operations of Multinational Firms: Concepts, History, and Data', NBER Working Paper Series (National Bureau of Economic Research, December 2001).

Sivi-Njonjo K., et al., *Local Communities in Kenya's Extractive Sector: From Paternalism to Partnership* (Katindi Sivi-Njonjo ed, Norwegian Church Aid (NCA) 2015).

Temper L., Bene D., and Martinez-Alier J., 'Mapping the Frontiers and Front Lines of Global Environmental Justice: The EJAtlas', *Journal of Political Ecology* 22 (2015).

Weber-Fahr M., Andrews C., Maraboli L. and Strongman J., “An Asset for Competitiveness: Sound Environmental Management in Mining Countries,” in OECD, *Foreign Direct Investment and the Environment: Lessons from the Mining Sector* (2002).

Wilhelms S.K., “Foreign Direct Investment and its Determinants in emerging economies,” *African Economic Policy Paper, Discussion Paper Number 9* (1998).

Internet Articles

<http://www.mining.go.ke> accessed on 18th September 2016

<http://www.palabora.com/palabora.asp> accessed on 15th February 2017.

Kenya Investment Network, ‘Institutional, Legal & Regulatory Framework Governing Mining in Kenya’, *Kenya Investment Network*, n.d., https://investinkenya.co.ke/main/view_article/48 accessed on 10th September 2016.

Muktar M., ‘Impact Of Transportation On Economic Growth: An Assessment of Road and Rail Transport Systems’, *Dr. Mustapha Muktar Archives*, 26 January 2011, <http://mustaphamuktar.blogspot.co.ke/2011/01/impact-of-transportation-on-economic.html> accessed on 10th September 2016.

Pascale Hatcher, ‘Local Communities and Multilateral Safeguards: The Mining Regime of Lao PDR’, Working Paper, *New Approaches to Building Markets in Asia*, 9, available at, http://lkyspp.nus.edu.sg/cag/wp-content/uploads/sites/5/2013/05/NATBMA_WP12-41.pdf accessed on 19th May 2016.

Pettinger T., ‘Factors That Affect Foreign Direct Investment (FDI)’, *Economics Help: Helping to Simplify Economics*, 29 January 2016, available at

<http://www.economicshelp.org/blog/15736/economics/factors-that-affect-foreign-direct-investment-fdi> accessed on 9th September 2016.

Valentino Piana, 'Foreign Direct Investment' (Economics Web Institute, 2005), available at, <http://www.economicwebinstitute.org/glossary/fdi.htm> accessed on 14th August 2016.

Reports

Kenya Mining Handbook, Government of Kenya Press, 2015.

Ministry of Mining, 'Kenya Mining Investment Handbook 2015' (Nairobi: Republic of Kenya Ministry of Kenya, 2015).

Ministry of Mining, 'The New Mining Act 2016 Handover to CS Mining', *Ministry of Mining*, 2016.

OECD-South Africa investment policy dialogue: Self-assessment of South Africa's investment regime in relation to the OECD Codes of Liberalisation and the principle of National Treatment (2014).

United Nations Conference on Trade and Development (UNCTAD), 'UNCTAD WID Country Profile: KENYA' (UNCTAD, November 2006).

United Nations Conference on Trade and Development, "World Investment Report 2007: Transnational Corporations, Extractive Industries and Development," The world Investment Report 2007 (WIR07) Switzerland: United Nations, 2007, available at http://unctad.org/en/Docs/wir2007p4_en.pdf accessed on 18th September 2016.

United Nations, 'Kyoto Protocol to the United Nations Framework Convention on Climate Change' (1998).

World Bank World Development Report 1992: Development and the Environment. New York: Oxford University Press.

World Commission on Environment and Development, 'Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report)' (Oslo, Norway: World Commission on Environment and Development, 1987).

Academic works: Theses

Adewumi S., 'The Impact of FDI on Growth in Developing Countries: An African Experience' (Master Thesis, Jönköping University 2006).

Ange A., 'Challenges and Prospects of Equitable Benefit Sharing in Mining Sector: A Case Study of Titanium Mining in Kwale County, Kenya' (University of Nairobi, 2014).

Barczewski B., 'How Well Do Environmental Regulations Work in Kenya? : A Case Study of the Thika Highway Improvement Project' (Nairobi: The Center for Sustainable Urban Development and the University of Nairobi, June 2013).

Biruhe Eshete and Thomas Gebre, 'Foreign Direct Investment (FDI) Development between the European Union (EU) and Least Developed Countries (LDCs) - Business Opportunities in Ethiopia' (Bachelor's Thesis, Haaga-Helia University of Applied Sciences, 2012).

Kiviyiro P.T., 'Foreign Direct Investment, Clean Development Mechanism, and Environmental Management: A Case of Sub-Saharan Africa' (Doctor of Science (Economics and Business Administration) Thesis, Lappeenranta University of Technology, 2015).

Menamo D., 'Impact of Foreign Direct Investment on Economic Growth of Ethiopia: A Time Series Empirical Analysis, 1974-2011' (Master of Philosophy in Environmental and Development Economics, University of Oslo, 2014).

Nguku E., 'Relationship between Foreign Direct Investment and Balance of Payments in Kenya' (Master of Business Administration, University of Nairobi, 2013).

Nyamwange M., 'Foreign Direct Investment in Kenya', MPRA Paper (University of Nairobi, 2 October 2009).

Otieno Vivian Achieng, 'The Right to Development and Foreign Direct Investment in Kenya' (University of Nairobi, 2013).

Sindre R., 'The Effects of Foreign Direct Investment on the Ugandan Economy' (Master's Thesis, University of Agder 2011).

TintswaloZiyane M., 'The Linkage between Foreign Direct Investment and Economic Growth: A Comparative Case Study of Kenya and South Africa' (MA (Economics) Thesis, University of Johannesburg 2008).